No. 87-1430

In the Supreme Court of the United States

SUPREME COURT, U.S.
FILED
FEB 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM 1987

A. JACQUES LOU,
Petitioner,

vs.

WILLIAM BELZBERG, et al.,
Respondents,
and
ASHLAND OIL, INC.,
Nominal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM S. LERACH
Counsel of Record
LEONARD B. SIMON
EUGENE MIKOLAJCZYK
JOYCE FITZPATRICK
MILBERG WEISS BERSHAD
SPECTHRIE & LERACH
225 Broadway, Suite 2000
San Diego, CA 92101
Telephone: (619) 231-1058
DAVID B. GOLD
DAVID B. GOLD,
A Professional Law Corporation
595 Market Street, Suite 2300
San Francisco, CA 94105
Telephone: (415) 777-2230
Counsel for Petitioner

February 23, 1988

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600

QUESTION PRESENTED FOR REVIEW

Whether a private right of action will lie under § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), thereby permitting state courts to adjudicate general antifraud claims under the federal securities laws.

LIST OF PARTIES

The appellant in the proceeding below was the Petitioner, A. Jacques Lou, who had sued the following individuals and entities: William Belzberg; Hyman Belzberg; Samuel Belzberg; First City Financial Corporation Ltd.; First City Trust Company; Roxboro Investments (1976) Ltd.; Bel-Fran Investments Ltd.; Bel-Cal Holdings Ltd.; Bel-Alta Holdings Ltd.; Drexel Burnham Lambert Incorporated; John R. Hall; Robert T. McCowan; William R. Seaton; Charles J. Luellen; Samuel C. Butler; Eugene W. Erikson; James B. Farley; Robert D. Gordon, Jr.; Walter W. Hillenmeyer, Jr.; Don T. McKone; Harold S. Mohler; Grover E. Murray; Jane C. Pfeiffer; Robert S. Reigeluth; James R. Rinehart; F. H. Ross, Jr.; Robert B. Stobaugh; Richard L. Terrell; and James W. Vandeveer. Ashland Oil, Inc. was the nominal defendant in Petitioner's derivative claims.

In the proceeding below, the following were respondent-appellants, all of whom had been enjoined by the district court: Pauline Mickler; William S. Lerach; Eugene Mikolajczyk; Milberg Weiss Bershad Specthrie & Lerach; David B. Gold; David B. Gold, A Professional Law Corporation; Erwin A. Sherman; Lynch, Sherman and Cox; Merrill G. Davidoff; Sherrie R. Savett; and Berger & Montague, P.C. The Ninth Circuit reversed the injunction. That issue is not addressed in this petition; consequently, these parties have not been named herein.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
I. Introduction	3
II. Description Of The Litigation	4
REASONS FOR GRANTING THE WRIT	8
I. A Decision By This Court Is Necessary To Decide An Issue Reserved By This Court, As To Which There Is A Split Among The Circuit Courts Of Appeals	8
II. The Writ Should Be Issued To Effectuate The 1933 Securities Act's Grant Of Concurrent, Non-Removable Jurisdiction To State Courts	10
III. Because The Decision Below Is Inconsistent With This Court's Decisions In Huddleston And Curran, The Writ Should Be Issued	10
A. The Ninth Circuit's Analysis Of The Contemporary-Legal-Context Test Of Congressional Intent Is Contrary To Several Decisions Of This Court	12
B. The Ninth Circuit's Rejection Of § 17(a) As An Unnecessary Duplication Of Other Remedies Under The 1933 And 1934 Acts Is Contrary To This Circuit's Huddleston Decision	16

Page

IV. This Case Presents The Important Issue Of Whether State-Court Litigants May Enforce Claims Under The General Antifraud Provisions Of The Federal Securities Acts In State Court 19

CONCLUSION 23

TABLE OF CONTENTS

Appendix		Page
A	*Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987)	A-1
B	*Lou v. Belzberg*, Memorandum of Decision and Order Thereon, No. 86-2465 DT(Px) (C.D. Cal. May 15, 1986)	B-1
C	*In re Washington Public Power Supply System Securities Litigation*, 823 F.2d 1349 (9th Cir. 1987)	C-1
D	*Lou v. Belzberg*, First Amended Verified Class Action and Shareholder's Derivative Complaint, filed April 14, 1986, Los Angeles, County Superior Court, No. 000972	D-1
E	*Mickler v. Belzberg*, Verified Class Action and Shareholder's Derivative Complaint, filed May 27, 1986, Los Angeles County Superior Court, No. OA 000983	E-1
F	*Lou v. Belzberg*, Order to Show Cause re Preliminary Injunction; Temporary Restraining Order, No. 86-2465 DT(Px) (C.D. Cal. May 28, 1986)	F-1
G	*Lou v. Belzberg*, Preliminary Injunction, No. 86-2465 DT(Px) (C.D. Cal. June 13, 1986)	G-1
H	Tally of Favorable Circuit and District Court Opinions on § 17(a) Issue as of 1975 vs. Unfavorable Opinions	H-1

TABLE OF AUTHORITIES

Cases

	Page
Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972)	11
Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985)	8, 9
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)	8
Brannan v. Eisenstein, 804 F.2d 1041 (8th Cir. 1986)	9
Carman v. First National Bank of Louisville, 642 F. Supp. 862 (W.D. Ky. 1986)	20
Chas. Kurz Co. v. Lombardi, 595 F. Supp. 373 (E.D. Pa. 1984)	20
Cianci v. Superior Court, 40 Cal. 3d 903, 221 Cal. Rptr. 575 (1985)	21
Corwin v. Marney, Orton Investments, 788 F.2d 1063 (5th Cir. 1986)	9
County of Cook v. MidCon Corp., 773 F.2d 892 (7th Cir. 1985)	20
Currie v. Cayman Resources Corp., [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,591 (11th Cir. 1988)	9
Defend v. Lascelles, 500 N.E.2d 712 (1986), *appeal denied*, 508 N.E.2d 726 (1987)	21
Ebnan Antique Rugs & Tapestries, Inc. v. New York Marine Managers, Inc., 488 N.Y.S.2d 534 (1984)	21
HMK Corp. v. Walsey, 637 F. Supp. 710 (E.D. Va. 1986)	20

TABLE OF AUTHORITIES

CASES

	Page
Herman & MacLean v. Huddleston, 459 U.S. 375 (1983)	*passim*
International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Daniel, 439 U.S. 551 (1979)	8
Karel v. Kroner, 635 F. Supp. 725 (N.D. Ill. 1986)	20
Kellman v. ICS, Inc., 447 F.2d 1305 (6th Cir. 1971)	9
Kirshner v. U.S., 603 F.2d 234 (2d Cir. 1978), *cert. denied*, 442 U.S. 909 and 444 U.S. 995 (1979)	9
Lincoln National Bank v. Herber, 604 F.2d 1038 (7th Cir. 1979)	9
Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987)	*passim*
Luebke v. Marine National Bank of Neenah, 567 F. Supp. 1460 (E.D. Wis. 1983)	20
Matek v. Murat, 638 F. Supp. 775 (C.D. Cal. 1986)	20
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)	*passim*
Mosher v. Kane, 784 F.2d 1385 (9th Cir. 1986)	6
Mursau Corp. v. Florida Penn Oil & Gas, Inc., 638 F. Supp. 259 (W.D. Pa. 1986), *aff'd without opinion*, 813 F.2d 398 (3d Cir. 1987)	9
Newman v. Prior, 518 F.2d 97 (4th Cir. 1975)	9
Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965 (1985)	21

TABLE OF AUTHORITIES

CASES

	Page
Printing Mart-Morristown, Inc. v. Rosenthal, 650 F. Supp. 1444 (D.N.J. 1987), *appeal denied without opinion*, 833 F.2d 306 (1987)	20
Puchall v. Houghton, Cluck, Coughlin & Riley (In re Washington Public Power Supply System Securities Litigation), 823 F.2d 1349 (9th Cir. 1987)	*passim*
Shearson/American Express, Inc. v. McMahon, ___ U.S. ___, 107 S. Ct. 2332 (1987)	21
Simpson Electric Corp. v. Leucadia, Inc., 481 N.Y.S.2d 627 (1984)	21

Statutes, Rules and Regulations

Securities Act of 1933

Section 11 (15 U.S.C. § 77k) ..... *Passim*

Section 12 (15 U.S.C. § 77l) 11, 16, 17, 18, 19

Section 17(a) (15 U.S.C. § 77q(a)) ..... *passim*

Section 22(a) (15 U.S.C. § 77v(a)) 2, 3, 4, 6, 10

Securities Exchange Act of 1934

Section 4-1(b) (15 U.S.C. § 78d-1(b)) 13

Section 10(b) (15 U.S.C. § 78j(b)) ..... *passim*

Section 27 (15 U.S.C. § 78aa) 4, 17

Trust Indenture Act of 1939

(15 U.S.C. § 77vvv(b)) 20

(15 U.S.C. § 77yyy) 13

Investment Company Act of 1940

(15 U.S.C. § 80a-43) 20

TABLE OF AUTHORITIES

STATUTES, RULES AND REGULATIONS

	Page
Investment Advisers Act of 1940	
(15 U.S.C. § 80(b))	13
(15 U.S.C. § 80b-14)	20
Securities Investor Protection Act of 1970	
(15 U.S.C. § 78iii(c))	13
Securities Acts Amendments of 1975	
89 Stat. 97, Pub. L. 94-29	12
89 Stat. 163, § 25	13
89 Stat. 169, § 27(a)	13
89 Stat. 170, § 30	13
18 U.S.C.	
§§ 1961-1968	6
28 U.S.C.	
§ 1254(1)	2
§ 1441(c)	6
§ 2283	7
17 C.F.R.	
Rule 10b-5 (§ 240.10b-5)	4

Secondary Authorities

Schwartz and Wiles, *Do Curran and Huddleston Validate a Private 17(a) Right of Action?*, Nat'l. L. J., July 23, 1984	15
H. R. Rep. No. 85, 73rd Cong., lst Sess.	19

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

A. JACQUES LOU,
Petitioner,

VS.

WILLIAM BELZBERG, et al.,
Respondents,

and

ASHLAND OIL, INC.,
Nominal Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner A. Jacques Lou respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, rendered on November 12, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 834 F.2d 730, and is reprinted in the Appendix hereto as Appendix A. The decision of the United States District Court for the Central District of California is unreported and is attached as Appendix B. The prior decision on the issue of a private right of action under § 17(a) by the United States Court of Appeals for the Ninth Circuit *en banc* is *Puchall v. Houghton, Cluck,*

Coughlin & Riley (*In re Washington Public Power Supply System Securities Litigation*), 823 F.2d 1349 (9th Cir. 1987), and is attached as Appendix C.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered November 12, 1987. No motion for rehearing was filed. This Court has jurisdiction by virtue of 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), provides:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a), provides in pertinent part:

> The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. . . . No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

STATEMENT OF THE CASE

I.

Introduction

Petitioner's action was brought as a derivative and class action in California state court on behalf of Ashland Oil, Inc. ("Ashland") and all owners of common stock of Ashland challenging "greenmail." Despite the non-removability provision of § 22(a), *supra*, it was removed to federal court and transferred to the Southern District of New York. On appeal, the non-removable claims under § 17(a) of the Securities Act of 1933 were dismissed in light of the Ninth Circuit's recent decision in *Puchall* which holds that no private right of action exists under § 17(a). The Ninth Circuit in this case, as well as in *Puchall*, has reversed its own prior decisions favoring a private right of action under § 17(a), thus furthering the split which exists among the Circuit Courts of Appeals.

This petition seeks to resolve this Circuit split as to the availability of a damage remedy under § 17(a) and in

addition to remove the barrier which the decision below has created to filing general antifraud claims in state courts under § 17(a) of the Securities Act of 1933. The other general antifraud provision of the federal securities laws, § 10(b) of the Securities Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5), is exclusively within the federal courts' jurisdiction (15 U.S.C. § 78aa). Thus, under the decision below the Ninth Circuit has declared that all general antifraud claims under the securities acts must be filed in federal court, despite Congress' clear provision for the state courts' concurrent, non-removable jurisdiction for claims under the Securities Act of 1933 in § 22(a) of that Act (15 U.S.C. § 77v(a)). The issues of whether there is a private cause of action under § 17(a) and the important jurisdictional differences involving actions under the 1933 and 1934 Acts have never been resolved by this Court. The effect of affirming the rule currently existing in the Ninth Circuit will be to foreclose substantial antifraud remedies provided in § 17(a) to litigants who choose to enforce their claims in state courts.

II.

Description Of The Litigation

The action below was brought both as a shareholders' derivative action on behalf of Ashland and as a class action on behalf of all persons, except defendants, who owned shares of the common stock of Ashland on April 1, 1986. The Complaint alleges that on April 1, 1986, Ashland entered into a "greenmail" buyout of the 2.6 million shares of Ashland stock owned by entities controlled by the Belzberg defendants at a $15.6 million profit to the Belzbergs. The action was filed by a California resident in Los Angeles County Superior Court. Appendix D. The

defendants are members of the Belzberg family and certain entities controlled and/or used by them to pursue the wrongs complained of; Drexel Burnham Lambert Incorporated, an investment banking firm which assisted the Belzberg defendants; and the Ashland directors.

The Complaint alleges that during early 1986, the Belzbergs accumulated 1.4 million shares of Ashland common stock (as well as options to purchase an additional 1.2 million shares) at prices ranging from $38½ to $45 per share. On March 26, 1986, the Belzbergs publicly announced an intention to make a cash tender offer of "at least $60.00 per share" for the balance of Ashland's outstanding common stock. The reaction of Ashland's directors was swift. On April 1, 1986 — barely five days after the Belzbergs announced the supposed "tender offer" — the directors of Ashland caused Ashland to purchase the 2.6 million Ashland shares owned or controlled by the Belzbergs for $51.00 per share. As part of the greenmail buyout, the Ashland directors and the Belzbergs further agreed that Ashland would offer to purchase 7.5 million shares of Ashland stock on the open market while selling 5.3 million shares to an Ashland ESOP controlled by the Ashland Board. The Complaint alleges that the buyout agreement, along with Ashland's public repurchase program and the ESOP plan, was consummated for no legitimate business purpose but only to further the interests of both the Belzbergs as the largest shareholders and the Ashland directors by securing their control over the company and eliminating the risk of a hostile tender offer. The Complaint further alleges that during the past ten years the Belzbergs have undertaken a pattern of greenmail raids on publicly held companies for the purpose of extracting huge profits for themselves in the form of large payments for controlling blocks of stock they had acquired.

Petitioner sought redress for these alleged wrongs through claims under § 17(a) of the 1933 Act and the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. §§ 1961-1968), as well as under state-law causes of action. Section 22(a) of the 1933 Act (15 U.S.C. § 77v(a)) vests state courts with concurrent jurisdiction for claims under the 1933 Act. Furthermore, § 22(a) provides that claims under the 1933 Act filed in state courts are *expressly non-removable* to federal court.

Despite the express non-removability of the action, on April 17, 1986, defendant William Belzberg removed the action to the United States District Court for the Central District of California. When Petitioner moved for remand on May 12, 1986, the Belzberg defendants cross-moved to transfer Petitioner's action to the United States District Court for the Southern District of New York.

By Order entered May 15, 1986, Appendix B, the district court denied Petitioner's motion to remand and granted defendants' motion to transfer the action to the Southern District of New York, despite both Petitioner's choice of her local forum and the numerous contacts between defendants and California. The district court recognized that an implied private right of action existed under § 17(a) under the Ninth Circuit authority of *Mosher v. Kane*, 784 F.2d 1385, 1388 (9th Cir. 1986). Appendix B at B1-2. However, the court ruled that plaintiff had not properly pled a § 17(a) cause of action.[1]

---

[1]The district court further ruled that "the RICO counts and the Section 17(a) claims are in fact 'separate and independent' because different factual proof is necessarily required and the protections afforded are fundamentally different," and thus the entire action was removable under 28 U.S.C. § 1441(c). Appendix B2-3.

While Petitioner's action was being removed to federal court and transferred to New York, on May 27, 1986, a different Ashland shareholder, Pauline Mickler, filed a separate state-court action challenging some of the same transactions. *Mickler v. Belzberg, et al.*, No. 0A000983, Los Angeles Superior Court, (the "*Mickler*" action), Appendix E. On May 28, 1986, defendant William Belzberg, on the basis of the federal district court's removal jurisdiction over Petitioner's action, obtained a temporary restraining order against Mickler and her counsel from prosecuting the *Mickler* state-court action. Appendix F. On June 3, 1986, the district court entered a preliminary injunction enjoining Mickler, her counsel and their agents "from further prosecuting" the *Mickler* action. Appendix G.

Petitioner, joined by Mickler and her counsel, filed an appeal both from the district court's order denying Petitioner's motion to remand and transferring her action to New York and from its injunction.

On appeal to the Ninth Circuit, the district court's ruling on the remand and transfer issues was affirmed, but for reasons different from those below. Relying on *Puchall v. Houghton, Cluck, Coughlin & Riley*, which had been decided by the Ninth Circuit while this case was on appeal, the appellate court held that there was no private right of action under § 17(a). 834 F.2d at 1358. Finding that there was concurrent jurisdiction over RICO claims, the Ninth Circuit held that removal was proper and that the district court had not abused its discretion in transferring Petitioner's action to the United States District Court for the Southern District of New York. However, the appellate court held that under the Anti-Injunction Act (28 U.S.C. § 2283), the district court had erred in entering the preliminary injunction prohibiting prosecu-

tion of the *Mickler* action. This Petition does not address the injunction issue.

In summary, as a consequence of the Ninth Circuit's *Puchall* decision, Petitioner was denied her right to enforce claims on behalf of Ashland and the Ashland shareholder class in state court under the broad antifraud provisions of § 17(a) of the 1933 Act. With the elimination of her non-removable § 17(a) claims, Petitioner was denied her chosen state forum, and her action was transferred across the country to an inconvenient forum. Petitioner requests that a Writ of Certiorari issue to review the lynchpin of the appellate court's order: denial of her right to assert claims under § 17(a) of the Securities Act of 1933.

REASONS FOR GRANTING THE WRIT

I

A Decision By This Court Is Necessary To Decide An Issue Reserved By This Court, As To Which There Is A Split Among The Circuit Courts Of Appeals

This Court has reserved the question of whether a private remedy exists under § 17(a) on four prior occasions.[2] Unlike this case, in each of those other cases the actions were filed in federal court, and the § 17(a) claim was coupled with a claim under § 10(b) of the Securities Exchange Act of 1934. The availability of the § 10(b) remedy either was cited as a reason for not resolving the

---

[2]*Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 304 n.9 (1985); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 378 n.2 (1983); *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Daniel*, 439 U.S. 551, 557 n.9 (1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733 n.6 (1975).

§ 17(a) private right of action issue, *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 304 n.9 (1985), or prompted plaintiff to abandon the § 17(a) claim. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 378 n.2 (1983). In this case, however, Petitioner filed her action in state court, and § 17(a) is her sole source of relief under the broad antifraud provisions of the federal securities laws.

At the present time, there is a major split of authority among the Circuit Courts of Appeals as to whether a private remedy is available under § 17(a).[3] A Writ of Certiorari should issue to resolve this question which has

---

[3]The following is a summary of the recent rulings by the Circuits on the issue:

Second Circuit: Kirshner v. U.S., 603 F.2d 234 (2d Cir. 1978) (finds private action), *cert. denied*, 442 U.S. 909 and 444 U.S. 995 (1979).

Third Circuit: Mursau Corp. v. Florida Penn Oil & Gas, Inc., 638 F. Supp. 259 (W.D. Pa. 1986) (denies action), *aff'd without opinion*, 813 F.2d 398 (3d Cir. 1987).

Fourth Circuit: Newman v. Prior, 518 F.2d 97 (4th Cir. 1975) (finds private action).

Fifth Circuit: Corwin v. Marney, Orton Investments, 788 F.2d 1063 (5th Cir. 1986) (denies action).

Sixth Circuit: Kellman v. ICS, Inc., 447 F.2d 1305 (6th Cir. 1971) (recognizes private action).

Seventh Circuit: Lincoln National Bank v. Herber, 604 F.2d 1038 (7th Cir. 1979) (finds action).

Eighth Circuit: Brannan v. Eisenstein, 804 F.2d 1041 (8th Cir. 1986) (denies action).

Ninth Circuit: In re Washington Public Power Supply System Securities Litigation, 823 F.2d 1349 (9th Cir. 1987) (denies action).

Eleventh Circuit: Currie v. Cayman Resources Corp., [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,591 (11th Cir. 1988) (denies action).

been reserved by this Court and as to which there is a divergence of authority among the Circuits.

II

The Writ Should Be Issued To Effectuate The 1933 Securities Act's Grant Of Concurrent, Non-Removable Jurisdiction To State Courts

This Court should issue the Writ to determine whether state courts will again be available for the prosecution of general antifraud claims under § 17(a). Section 22(a) of the 1933 Act evidences Congress' intent that claims to enforce the remedies under the 1933 Act shall be non-removable to the federal courts. As discussed in part IV, *infra,* recognition of a private remedy under § 17(a) is consistent with § 22(a) and with the emerging body of law recognizing state-court jurisdiction to resolve claims based on securities fraud.

III

Because The Decision Below Is Inconsistent With This Court's Decisions In *Huddleston* And *Curran*, The Writ Should Be Issued

In *Puchall*, the Ninth Circuit engaged in an analysis of whether Congress had intended to provide a private right of action under § 17(a). Yet the court in *Puchall* committed two fundamental errors in trying to determine Congressional intent relating to § 17(a). In making these errors, the appellate court misinterpreted and misapplied precedents of this Court in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982).

First, in *Huddleston* and *Curran*, this Court enunciated that where there is a "consistent" and "uniform" body of precedent recognizing a private right of action under a federal statute, Congressional silence in amending the statute evidences an intent to affirm the private-action remedy. The Ninth Circuit rejected this standard and applied its own, holding that there must be a "high degree of uniformity" or an "overwhelming consensus" in the judicial precedents before such intent can be inferred. *Puchall*, 823 F.2d at 1356-57. Moreover, the Ninth Circuit rejected the overwhelming body of precedent recognizing a private right of action under § 17(a) in 1975, when Congress amended the federal securities laws. *See* discussion at Part A, *infra*, and Appendix H, attached hereto.

Second, the Ninth Circuit concluded that Congress could not have intended to create a private remedy under the broad antifraud provisions of § 17(a) because it had already provided limited private remedies under §§ 11 and 12 of the 1933 Act. The Ninth Circuit went on to say that, in any event, because § 10(b) of the 1934 Act provided a broad antifraud remedy, it could not have been Congress' intent to create a private remedy for § 17(a). These methods of discerning Congressional intent were expressly rejected in *Huddleston*. Moreover, they are also entirely contrary to the policy favoring the broad construction of the securities laws to effectuate their remedial purposes. *See, e.g., Huddleston*, 459 U.S. at 384, and *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972).

Petitioner respectfully submits that the Petition should be granted to correct these errors and to insure the application of the proper legal standards for determining Congressional intent to recognize private rights of action.

A. The Ninth Circuit's Analysis Of The Contemporary-Legal-Context Test Of Congressional Intent Is Contrary To Several Decisions Of This Court

In *Herman & MacLean v. Huddleston* and *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, this Court recognized that when discerning Congress' intent after it has enacted amendments to existing federal statutes, the court is to examine the "contemporary legal context" in which the amendments took place.

In 1975, Congress enacted comprehensive revisions to the federal securities laws. Securities Acts Amendments of 1975, Pub. L. 94-29, 89 Stat. 97. At that time, it left intact both § 10(b) of the 1934 Act and § 17(a) of the 1933 Act. In 1982, this Court was asked to determine in *Huddleston* whether a private remedy existed under § 10(b) of the 1934 Act. The precise issue was whether a private right of action would lie in favor of a claimant under the broad antifraud provisions of § 10(b) when the claimant also had an express right of action under the more limited provisions of § 11 of the 1933 Act relating to misrepresentations and omissions in a registration statement. This Court found that Congress *had* intended to create a private right of action under § 10(b) and that it had not intended to create an exception to § 10(b) for fraud in a registration statement just because that fraud might also be actionable under § 11 of the 1933 Act. *Huddleston*, 459 U.S. at 387.

In discerning Congress' intent, this Court noted in *Huddleston* that at the time the federal securities acts were amended in 1975, "federal courts had consistently and routinely permitted a plaintiff to proceed under § 10(b)," and thus Congress had intended to ratify this state of the law when it left § 10(b) untouched as part of

the 1975 amendments.[4] 459 U.S. at 385. In support of this conclusion regarding the state of the law in 1975, the *Huddleston* decision cited five circuit court and three district court decisions that had recognized a § 10(b) private cause of action as of 1975. *Id.* at 386 n.21. This Court also noted two pre-1975 district court decisions that had rejected a § 10(b) private remedy. *Id.*

In *Curran*, this Court employed the contemporary-legal-context analysis and affirmed the existence of a private right of action under the Commodity Exchange Act ("CEA"). Even though the judicial decisions that had recognized a private cause of action under the CEA were neither "old" nor "overwhelming" at the time the statute was amended, this Court held that Congress had intended to ratify the position favoring a private right of action when it amended the CEA without changing the provision on liabilities. *Curran*, 456 U.S. at 380. In fact, this Court specifically noted that at the time of the amendments there was no strong consensus regarding the CEA but that the courts had "simply assumed that the

---

[4]In addition to amending the 1933 and 1934 Acts, 1975 legislation also amended several other laws relating to securities, such as the Securities Investor Protection Act of 1970 (15 U.S.C. § 78iii(c)), the Investment Advisers Act of 1940 (15 U.S.C. § 80(b)), the Trust Indenture Act of 1939 (15 U.S.C. § 77yyy), and "[a]n Act to authorize the Securities and Exchange Commission to delegate certain functions" approved on August 20, 1962 (15 U.S.C. § 78d-1(b)). *See* §§ 25, 27(a) and 30, 89 Stat. 163, 169-170. Thus, the Securities Acts Amendments of 1975 were a comprehensive review and revision by Congress of the securities laws of the United States in general. The fact that § 17(a) of the 1933 Act was left undisturbed is very significant.

remedy was available." *Id.* at 380. This Court in *Curran* stated the inquiry as follows:

> When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts, however, the inquiry logically is different [from that directed at brand new legislation]. Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the pre-existing remedy.

Id. at 378-79.

Petitioners argued below (as did plaintiffs in *Puchall*) that this analysis was controlling here and provided a private damage remedy since the § 17(a) remedy had been widely recognized in 1975, the time of the Securities Acts Amendments. Instead of the *Huddleston* and *Curran* test of "consistent and routine" recognition of an implied remedy at the time that Congress amended the securities acts in 1975, the Ninth Circuit in *Puchall* held that the test was whether there was an "overwhelming consensus" and a "high degree of uniformity" in the recognition of a private cause of action under § 17(a) in 1975. *Puchall,* 823 F.2d at 1356-57. This fundamental misapplication of *Huddleston* and *Curran* should and must be reversed.[5]

Moreover, the Ninth Circuit was incorrect in its analysis of the state of the law on the § 17(a) private remedy issue in 1975. At the time of the 1975 Securities Acts Amendments, the Second, Third, Fourth, Fifth and Sev-

---

[5]The Ninth Circuit purported to cite *Curran* as the authority for its "high degree of uniformity" test. 823 F.2d at 1356. This language appears nowhere in *Curran,* which affirms that the test is whether the courts "routinely and consistently" recognized a private remedy. 456 U.S. at 379.

enth Circuits had addressed the § 17(a) issue and had stated or held that an implied remedy existed under § 17(a). Decisions in the Sixth, Eighth, Ninth and Tenth Circuits assumed the existence of a private remedy under § 17(a) while deciding other issues. *No* circuit court that had squarely addressed the § 17(a) issue had denied a private right of action,[6] and a wide majority of the district courts that had addressed the issue supported a § 17(a) private action by a three-to-one ratio. Only a distinct minority of the district court decisions refused to recognize a private right of action. (The volume of cases as of 1975 favorable on the § 17(a) issue and those opposed has been attached as Appendix H for the Court's convenience.) Thus, at the time of the 1975 amendments, Congress would reasonably have assumed that the courts would continue to recognize a private remedy to redress violation of § 17(a).

In contrast to this routine and consistent line of decisions, the only authorities cited by the Ninth Circuit for its conclusion that there was no consensus on § 17(a) were two pre-1975 *district* court decisions which denied a § 17(a) private remedy, a *1977* district court decision stating that some courts had changed their views on the issue "in recent years" and a *1982* securities reference book which stated that the lower federal courts were divided on the issue. *Puchall,* 823 F.2d at 1357 n.19. It is obvious, therefore, that the Ninth Circuit neither applied

---

[6]Schwartz and Wiles, *Do Curran and Huddleston Validate a Private 17(a) Right of Action?*, Nat'l. L. J., July 23, 1984, at 20, cols. 2, 3 ("Although the decisions at the district court level were not unanimous, at the time of the 1975 amendments, all the circuit courts that had squarely confronted the issue upheld the existence of an implied damage remedy. Indeed, in the 1969 edition of his treatise, Prof. Louis Loss wrote that the existence of the Sec. 17(a) private remedy 'seems to be taken for granted.' ").

the contemporary-legal-context test as established by this Court nor did it properly read the authority that existed on the § 17(a) issue in 1975. The Writ should be issued to correct the Ninth Circuit's erroneous application of the *Huddleston* and *Curran* criteria.

B. The Ninth Circuit's Rejection Of § 17(a) As An Unnecessary Duplication Of Other Remedies Under The 1933 And 1934 Acts Is Contrary To This Circuit's *Huddleston* Decision

A major premise in the Ninth Circuit's attempt to discern Congressional intent was that the remedies under § 17(a) merely duplicate the remedies under § 10(b) of the 1934 Act and that by creating remedies under §§ 11 and 12 of the 1933 Act, Congress had intended to preclude a private right of action under § 17(a). This Court has expressly rejected these types of analyses to ascertain Congress' intent to create private remedies under the federal securities laws.

First, this Court's holding in *Huddleston* expressly states that the existence of a partial overlap between the 1933 Act and the 1934 Act is not a basis for concluding that Congress intended to limit the protections created in either statute:

> While some conduct actionable under § 11 may also be actionable under § 10(b), it is hardly a novel proposition that the 1934 Act and the 1933 Act "prohibit some of the same conduct." *United States v. Naftalin*, 441 U.S. 768, 778 (1979) (applying § 17(a) of the 1933 Act to conduct also prohibited by § 10(b) of the 1934 Act in an action by the SEC). " 'The fact that there may well be some overlap is neither unusual nor unfortunate.' " *Ibid.*, quoting *SEC v. National Securities, Inc.*, 393 U.S. 453, 468 (1969).

Huddleston, 459 U.S. at 383. The Ninth Circuit's attempt to determine a Congressional intent based upon what it believed was an overlap of the statutes ignores this critical teaching of *Huddleston*.

Second, *Puchall* arose in the context of a federal-court proceeding where the plaintiffs were simultaneously pursuing claims under § 17(a) of the 1933 Act and under § 10(b) of the 1934 Act. *See Puchall*, 823 F.2d at 1335. *Puchall* thus did not involve any consideration of the access-to-state-court issue. Indeed, without any critical analysis, the Ninth Circuit assumed in *Puchall* that the availability of a remedy under the broad antifraud provisions of § 10(b) rendered § 17(a) superfluous, and thus Congress could not have intended to create a private right of action under § 17(a). *Id.* at 1354. As this case demonstrates, however, there are important practical reasons for recognizing a private right of action under § 17(a) — reasons that have never been presented to or resolved by this Court. Because Petitioner filed her case in state court, her only redress for violation of the broad antifraud provisions of the federal securities acts is under § 17(a). A state court does not have jurisdiction to consider a claim under the broad antifraud provisions of § 10(b) of the 1934 Act because the jurisdiction for 1934 Act claims is exclusively in federal courts. 15 U.S.C. § 78aa. The Ninth Circuit's attempt to discern a Congressional intent based on the assumption that there is no practical difference in the two statutes is simply wrong.

Finally, the Ninth Circuit's method of trying to determine Congressional intent not to recognize a private cause of action under § 17(a) based upon the express creation of private rights under §§ 11 and 12 of the 1933 Act was also condemned in *Huddleston*. In *Huddleston*, defendants argued, *inter alia*, that because § 11 over-

lapped with certain activities prohibited by § 10(b) and because Congress created an express right of action for § 11 but was silent as to § 10(b), there was no Congressional intent to create a private right under § 10(b). Rejecting this argument, this Court observed that the limited provisions of § 11 address "different types of wrongdoing" from those in § 10(b). Because § 10(b) is a broad " 'catchall' antifraud provision," this Court reasoned that Congress could not have intended to prohibit private actions under § 10(b) simply because it had created an express remedy under the more "limited" § 11. *Huddleston,* 459 U.S. at 382. This Court refused to "carve out an exception to § 10(b) for fraud occurring in a registration statement just because the same conduct may also be actionable under § 11." *Id.* at 382-83 (footnote omitted).

Contrary to this Court's reasoning in *Huddleston*, the Ninth Circuit concluded that Congress could not have intended to create a private remedy under the broader "catchall" provisions of § 17(a) because it had expressly created private rights under the limited provisions of §§ 11 and 12. *Puchall,* 823 F.2d at 1355. This overreaching to discern Congress' intent to limit rights under broad antifraud provisions based upon the existence of much more limited rights is expressly contrary to the holding in *Huddleston.*[7]

---

[7]The Ninth Circuit also cited a portion of the legislative history of the 1933 Act as a reason for refusing to recognize a private cause of action under § 17(a). The Ninth Circuit believed that Congress had expressed an intent to limit liability to §§ 11 and 12 on the basis that the imposition of " 'greater responsibility' than that provided by sections 11 and 12 'would unnecessarily restrain the conscientious

IV

This Case Presents The Important Issue Of Whether State-Court Litigants May Enforce Claims Under The General Anti-Fraud Provisions Of The Federal Securities Acts In State Court

Petitioner's case presents the important issue of whether state-court litigants may employ the general antifraud provisions of § 17(a) of the 1933 Act. This issue

---

administration of honest business with no compensating advantage to the public.' " *Puchall*, 823 F.2d at 1355. (footnote continued)

The portion of the House Report cited by the Ninth Circuit was taken out of context. The entire paragraph of the House Report merely discusses the impact of the burden of the due diligence defense under §§ 11 and 12 and whether that burden should be made greater. There is absolutely no indication in the quoted paragraph that Congress intended to prohibit liability under § 17(a).

> The provisions throwing upon the defendant in suits under sections 11 and 12 the burden of proof to exempt himself are indispensible to make the buyer's remedies under these sections practically effective. Every lawyer knows that with all the facts in the control of the defendant it is practically impossible for a buyer to prove a state of knowledge or a failure to exercise due care on the part of defendant. Unless responsibility is to involve merely paper liability it is necessary to throw the burden of disproving responsibility for reprehensible acts of omission or commission on those who purport to issue statements for the public's reliance. The responsibility imposed is no more nor less than that of a trust. It is a responsibility that no honest banker and no honest business man should seek to avoid or fear. To impose a lesser responsibility would nullify the purposes of this legislation. To impose a greater responsibility, apart from constitutional doubts, would unnecessarily restrain the conscientious administration of honest business with no compensating advantage to the public.

H. R. Rep. No. 85, 73rd Cong., lst Sess. at 9-10. The House Committee's comments, then, do not limit the scope of private remedies to §§ 11 and 12 but rather explain the burden-shifting requirements of those sections.

distinguishes Petitioner's case from others in which this Court has declined to address the § 17(a) issue.

As a result of the *Puchall* opinion, Ninth Circuit litigants are confronted with the choice of suing in state court and foregoing their rights to a broad antifraud remedy under the federal securities laws or suing in federal court to invoke the remedies under § 10(b). This inconsistency will only create greater burdens on the federal courts — a relevant factor in discerning Congress' intent.

Issuance of the Writ will also afford an opportunity to bring the law in the Ninth Circuit in line with decisions favoring state-court adjudication of securities claims under the federal securities laws, including securities class actions. State courts have jurisdiction to resolve numerous claims under the federal securities laws.[8] The trend is also to recognize that state courts have current jurisdiction over RICO actions,[9] which serve as an ad-

---

[8]In addition to resolving claims under the 1933 Act, state courts have jurisdiction over claims under the Trust Indenture Act of 1939, 15 U.S.C. § 77vvv(b), the Investment Company Act of 1940, 15 U.S.C. § 80a-43, and the Investment Advisers Act of 1940, 15 U.S.C. § 80b-14.

[9]The Ninth Circuit held in this action that state courts had concurrent jurisdiction over RICO. 834 F.2d at 735-39. Other courts that have recognized concurrent state-federal court jurisdiction over RICO are:

County of Cook v. MidCon Corp., 773 F.2d 892, 905 n.4 (7th Cir. 1985); *Printing Mart-Morristown, Inc. v. Rosenthal*, 650 F. Supp. 1444 (D.N.J. 1987), *appeal denied without opinion*, 833 F.2d 306 (1987); *Carman v. First National Bank of Louisville*, 642 F. Supp. 862 (W.D. Ky. 1986); *Matek v. Murat*, 638 F. Supp. 775 (C.D. Cal. 1986); *HMK Corp. v. Walsey*, 637 F. Supp. 710 (E.D. Va. 1986); *Karel v. Kroner*, 635 F. Supp. 725 (N.D. Ill. 1986); *Chas. Kurz Co. v. Lombardi*, 595 F. Supp. 373 (E.D. Pa. 1984); *Luebke v. Marine National Bank of Neenah*,

junct in the enforcement of securities fraud claims. It is incongruous, then, to believe that Congress intended to vest state courts with authority to resolve these types of securities law claims while it also intended to exclude claims under the general antifraud provisions of § 17(a) and to restrict such claims to federal courts under § 10(b).[10]

The rulings of the Ninth Circuit in *Puchall* and in this case also impede the decision of this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965 (1985), which now permits state courts to adjudicate nationwide class action issues, including securities class actions.[11] The utility of the state-court class action was a pivotal part of the *Shutts* holding:

> Modern plaintiff class actions follow the same goals [as those articulated in *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940)], permitting litigation of a suit involving common questions when there are too many plaintiffs for proper joinder. Class actions also may permit the

---

567 F. Supp. 1460 (E.D. Wis. 1983); *Cianci v. Superior Court*, 40 Cal. 3d 903, 221 Cal. Rptr. 575 (1985); *Simpson Electric Corp. v. Leucadia, Inc.*, 481 N.Y.S.2d 627 (1984); *Ebnan Antique Rugs & Tapestries, Inc. v. New York Marine Managers, Inc.*, 488 N.Y.S.2d 534 (1984); *Defend v. Lascelles*, 500 N.E.2d 712 (1986), *appeal denied*, 508 N.E.2d 726 (1987).

[10]The trend to relieve the congestion in the federal courts is also manifested by this Court's holding in *Shearson/American Express, Inc. v. McMahon*, ____ U.S. ____, 107 S. Ct. 2332 (1987), that securities claims against broker-dealers and based on written agreements are subject to arbitration.

[11]*Shutts* did caution that a state court could only impose its particular laws in a nationwide class action if certain due process requirements were met. Of course, if state courts are free to enforce a nationwide standard under § 17(a), the utility of state-court class actions will be enhanced.

> plaintiffs to pool claims which would be uneconomical to litigate individually.

Id. at ____, 105 S. Ct. at 2974. The benefits flowing from state-court class actions will, however, be severely restricted by the Ninth Circuit's decision prohibiting private enforcement of § 17(a). Recognizing state-court authority to enforce a nationwide body of federal law based on § 17(a) will encourage the use of state courts to resolve securities claims, including class actions, like Petitioner's.

CONCLUSION

For all the above reasons, this Petition should be granted.

Dated: February 10, 1988

Respectfully submitted,

WILLIAM S. LERACH
Counsel of Record
LEONARD B. SIMON
EUGENE MIKOLAJCZYK
JOYCE FITZPATRICK
MILBERG WEISS BERSHAD
SPECTHRIE & LERACH
225 Broadway, Suite 2000
San Diego, CA 92101
Telephone: (619) 231-1058

DAVID B. GOLD
DAVID B. GOLD, a Professional
Law Corporation
595 Market Street, Suite 2300
San Francisco, CA 94105
Telephone: (415) 777-2230
Counsel for Petitioner

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-6057
D.C. No.
CV-86-2465-DT

A. JACQUES LOU,

Plaintiff/Appellant,

v.

WILLIAM BELZBERG; HYMAN BELZBERG; SAMUEL BELZBERG; FIRST CITY FINANCIAL CORPORATION; FIRST CITY TRUST COMPANY; ROXBORO INVESTMENTS LTD.; BEL-FRAN INVESTMENTS LTD.; BEL-CAL HOLDINGS LTD.; BEL-ALTA HOLDINGS LTD.; DREXEL BURNHAM LAMBERT INC.; JOHN R. HALL; ROBERT T. MCCOWAN; WILLIAM R. SEATON; CHARLES J. LUELLEN; SAMUEL C. BUTLER; EUGENE W. ERIKSON; JAMES B. FARLEY; ROBERT D. GORDON; WALTER H. HILLENMEYER; DON T. MCKONE; HAROLD S. MOHLER; GROVER E. MURRAY; JANE C. PFEIFFER; ROBERT S. REIGELUTH; F.H. ROSS; ROBERT B. STOBAUGH; RICHARD L. TERRELL; JAMES W. VANDEREER,

Defendants/Appellees.

No. 86-6144
D.C. No. CV-86-2465-DT
OPINION

A. JACQUES LOU,
Plaintiff/Appellee,

v.

WILLIAM BELZBERG; HYMAN BELZBERG; SAMUEL BELZBERG; FIRST CITY FINANCIAL CORPORATION; FIRST CITY TRUST COMPANY; ROXBORO INVESTMENTS LTD.; BEL-FRAN INVESTMENTS LTD.; BEL-CAL HOLDINGS LTD.; BEL-ALTA HOLDINGS LTD.; DREXEL BURNHAM LAMBERT INC.; JOHN R. HALL; ROBERT T. MCCOWAN; WILLIAM R. SEATON; CHARLES J. LUELLEN; SAMUEL C. BUTLER; EUGENE W. ERIKSON; JAMES B. FARLEY; ROBERT D. GORDON; WALTER W. HILLENMEYER; DON T. MCKONE; HAROLD S. MOHLER; GROVER E. MURRAY; JANE C. PFEIFFER; ROBERT S. REIGELUTH; JAMES R. RINEHART; F.H. ROSS; ROBERT STOBAUGH; RICHARD L. TERRELL; JAMES W. VANDEREER; ASHLAND OIL, INC.,

Defendants/Appellees,

PAULINE MICKLER; ERWIN A. SHERMAN; LYNCH, SHERMAN & COX; MERRIL G. DAVIDOFF; SHERRIE R. SAVETT; BERGER & MONTAGUE, P.C.,

Respondents/Appellants.

Argued and Submitted
October 2, 1986 — San Francisco, California
Submission Withdrawn February 19, 1987
Resubmitted — August 20, 1987

Filed November 12, 1987

Before: Procter Hug, Jr., Betty B. Fletcher and Robert Boochever, Circuit Judges

Opinion by Judge Boochever

Appeal from the United States District Court for the Central District of California
Dickran M. Tevrizian, Jr., District Judge, Presiding

SUMMARY

Securities/Injunctions

Appeal from judgment. Affirmed in part, reversed in part, and remanded.

Appellant Lou filed a shareholders' derivative action on behalf of Ashland Oil Company (Ashland), a Kentucky corporation, and a class action on behalf of all persons who owned Ashland common stock except members of the appellee Belzberg family and others. Lou alleges that Ashland shareholders were damaged by the wrongful acts of the Belzbergs. Lou filed her complaint in Los Angeles. Defendants removed. Lou sought to remand the action while defendants moved to transfer the matter to New York. The district court denied the motion to remand. The district court then ordered transfer of the action to New York. Pauline Mickler, an Ashland shareholder, then instituted a similar action in state court against the Belzbergs *(Mickler)*. The district court then granted the *Lou* defendants a temporary restraining order, enjoining the prosecution of the *Mickler* action and simultaneously denied Lou's motion to stay the transfer to New York. Lou filed her notice of appeal and approximately one month later the transferred records were docketed in New York.

[1] Since this court adopts the docketing date as the time of the case's effective transfer, it finds appellate jurisdiction had already been acquired. [2] In *Puchall*, this court held that no private right of action exists under

section 17(a) of the Securities Act of 1933. In its wake, there is no statutory restriction on removing the action to federal court other than complying with the removal statute. Lou, in alleging a private civil RICO cause of action asserted a claim within the original jurisdiction of the district court. This does not, however, end the court's analysis. [3] Arguments favor concurrent jurisdiction over RICO claims. [4] The court finds none of the factors necessary to rebut the presumption of concurrent jurisdiction of the private cause of action created by RICO section 1964(c) claims. [5] This holding disposes of any barrier erected by the derivative jurisdiction doctrine. Accordingly, the district court correctly denied the motion to remand. [6] Lou argues that the district court abused its discretion by transferring this action without due regard to Lou's choice of forum. [7] When an individual brings a derivative suit or represents a class, the named plaintiff's choice of forum is given less weight. [8] The district court did not abuse its discretion in deciding to transfer this action. [9] Lastly, the Belzbergs argue that the district court appropriately granted injunctive relief under the "necessary in aid of its jurisdiction" exception and the "expressly authorized" exception of the Anti-Injunction Act. Unless one of the statutory exceptions applies, a federal injunction restraining prosecution of a lawsuit in state court is absolutely prohibited. [10] The mere existence of a parallel action in state court does not rise to the level of interference with federal jurisdiction necessary to permit injunctive relief under the "necessary in aid of" exception. [11] Upon removal to federal court, "the State court shall proceed no further unless and until the case is remanded." [12] Under the circumstances of *Mickler* the preliminary injunction was not authorized.

COUNSEL

Robert S. Warren and Claire D. Johnson, Los Angeles, California, for the appellees.

William S. Leach, San Diego, California, for the appellants.

OPINION

BOOCHEVER, Circuit Judge:

OVERVIEW

A. Jacques Lou (Lou) appeals the district court's denial of Lou's motion to remand, the granting of a motion to transfer the action to the Southern District of New York, and the enjoining of a similar state court proceeding. The district court found that Lou improperly pled a section 17(a) violation of the 1933 Securities Act and that the Racketeer Influenced and Corrupt Organizations Act (RICO) claims, 18 U.S.C. §§ 1961-68, and the section 17(a) claims were "separate and independent," thus affording the court removal jurisdiction pursuant to 28 U.S.C. § 1441(c). We affirm the district court on these issues, but for different reasons. We reverse, however, the district court's preliminary injunction of the state court action. In resolving this appeal we hold that state and federal courts have concurrent jurisdiction over RICO claims, but we do not address the sufficiency of Lou's section 17(a) pleadings, or whether the RICO claims and the section 17(a) claims are separate and independent.

FACTS

Lou filed a shareholders' derivative action on behalf of Ashland Oil Company, Inc. (Ashland), a Kentucky

corporation, and a class action on behalf of all persons who owned Ashland common stock on April 1, 1986, except members of the Belzberg family and certain entities controlled or used by them, Drexel Burnham Lambert Inc., an investment banking firm which assisted the Belzbergs, and the Ashland directors. Lou alleges that she and a number of other Ashland shareholders were damaged by the wrongful acts of the Belzbergs.

During the early part of 1986, the Belzbergs accumulated several million shares of Ashland common stock. Ashland publicly reported the acquisition of eight to nine percent of Ashland stock on March 25, 1986. The next day, the Belzbergs disclosed that they owned 9.2% of Ashland stock and offered to buy the remaining outstanding shares. As a consequence of these actions, the price of Ashland stock increased. On April 1, 1986, Ashland announced that it had agreed to repurchase 2.6 million shares of Ashland stock from the Belzbergs. This caused the price of the stock to fall. The Belzberg family realized a substantial profit from the transaction.

Lou filed her complaint in Los Angeles Superior Court alleging violations of state law fiduciary obligations, section 17(a) of the Securities and Exchange Act of 1933, 15 U.S.C. § 77(q)(a) (1982), and the RICO statute, 18 U.S.C. §§ 1961-68 (1982 & Supp. III 1985). Under the authority of *Heckmann v. Ahmanson,* 168 Cal. App. 3d 119, 214 Cal. Rptr. 177 (1985), Lou sought a temporary restraining order, expedited discovery, and a constructive trust on the Belzbergs' "greenmail" profit from the Ashland stock sale.

On April 17, 1986, defendants removed the action to the United States District Court for the Central District of California, pursuant to 28 U.S.C. §§ 1441(a) and (c) (1982). Lou sought to remand the action to state court

while defendants moved to transfer the matter to the Southern District of New York. The district court denied the motion to remand on two grounds. First, although section 17(a) claims brought in state court are generally not removable, *see* 15 U.S.C. § 77v(a) (1982), the district court found that Lou's pleadings did not adequately allege a section 17(a) violation. Thus removal was permissible under 28 U.S.C. § 1441(a) based on the federal RICO claim. Second, the district court determined that Lou's RICO claims were "separate and independent" from her other claims, making her action removable under 28 U.S.C. § 1441(c). The district court then ordered transfer of the action to New York in the interests of justice and for the convenience of the parties and witnesses.

On May 27, 1986, Pauline Mickler, an Ashland shareholder represented by the same attorneys as Lou and two additional law firms, instituted a similar action in state court against the Belzbergs and several new defendants. The complaint asserted additional state law claims and omitted the federal claims. *Mickler v. Belzberg,* No. CA000983, Los Angeles County Super. Ct. (*Mickler*). The next day the district court granted the *Lou* defendants a temporary restraining order, enjoining the prosecution of the *Mickler* action. The court also sent the *Lou* record to the District Court for the Southern District of New York on May 28.

On June 3, 1986, the United States District Court for the Central District of California issued a preliminary injunction against prosecution of the *Mickler* action and simultaneously denied Lou's motion to stay the transfer pending appellate review of the district court's denial of remand, issuance of the injunction, and transfer of the case to New York. Lou filed her notice of appeal on June

12, 1986. On July 7, 1986, the transferred records were docketed in the Office of the Clerk of the Southern District of New York.

DISCUSSION

Appellate Jurisdiction

We have jurisdiction to review this case under 28 U.S.C. § 1292(a)(1) (1982), which allows appeals from the grant or denial of a preliminary injunction. *Genosick v. Richmond Unified School Dist.*, 479 F.2d 482, 482-83 (9th Cir. 1973). In an appeal from a preliminary injunction, we will also review a denial of a motion to remand, *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 818 (9th Cir. 1985) (citing *Albi v. Street & Smith Publications, Inc.*, 140 F.2d 310, 311 (9th Cir. 1944)), and a transfer order made under 28 U.S.C. § 1404(a) (1982), *United States Aluminum Corp. v. Kawneer Co.*, 694 F.2d 193, 195 (9th Cir. 1982).

[1] The Belzbergs contend, however, that because the case was transferred to the Southern District of New York, this court lacks appellate jurisdiction. We have not yet established a rule determining when a transfer under 28 U.S.C. § 1404(a) becomes effective, thus terminating our jurisdiction. Section 1404(a) provides for the transfer of an action to another district for the convenience of parties and witnesses, in the interest of justice. Other circuits have held that a section 1404 transfer ends the jurisdiction of both the transferor court and the corresponding appellate court when the motion is granted and the papers are entered in the transferee court's records. *See In re Sosa*, 712 F.2d 1479, 1480 (D.C. Cir. 1983); *In re Nine Mile Ltd.*, 673 F.2d 242, 243 (8th Cir. 1982); *Starnes v. McGuire*, 512 F.2d 918, 924, 935 (D.C. Cir. 1974) (en banc); *In re Southwestern Mobile Homes, Inc.*, 317 F.2d 65,

66 (5th Cir. 1963); *Drabik v. Murphy,* 246 F.2d 408, 409 (2d Cir. 1957). We adopt the docketing date as the time of effective transfer.

As Lou filed her appeal on June 12, 1986, before the papers were docketed in New York, this court had already acquired appellate jurisdiction before the transfer was effective. Once jurisdiction is properly obtained by the appellate court it is not terminated by the subsequent completion of a section 1404 transfer. *See Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.,* 178 F.2d 866, 869 (2d Cir. 1950).

Standard of Review

The primary basis for our jurisdiction is review of the preliminary injunction under 28 U.S.C. § 1292(a) (1982). A district court's order regarding preliminary injunctive relief is subject to limited review. The grant or denial of a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Colorado River Indian Tribes v. Town of Parker,* 776 F.2d 846, 849 (9th Cir. 1985); *Bank of America Nat'l Trust & Sav. Ass'n v. Summerland County Water Dist.,* 767 F.2d 544, 547-48 (9th Cir. 1985). If the case was not properly removed to the federal court it would be an abuse of discretion to enjoin prosecution of a similar state case. Removal of a case from state to federal court is a question of federal subject matter jurisdiction, which is reviewed de novo. *Williams v. Caterpillar Tractor Co.,* 786 F.2d 928, 930 (9th Cir. 1986) (citing *Bright v. Bechtel Petroleum, Inc.,* 780 F.2d 766, 768 (9th Cir. 1986)), *aff'd,* 107 S. Ct. 2425 (1987). Once a case is removed, federal law rather than state law governs the future course of the proceedings. *Granny Goose Foods,*

Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70, 415 U.S. 423, 437 (1974); *Preaseau v. Prudential Ins. Co. of America,* 591 F.2d 74, 79 (9th Cir. 1979).

The district court's decision transferring venue to the Southern District of New York pursuant to 28 U.S.C. § 1404(a) is reviewed for an abuse of discretion. *See Cheng v. Boeing Co.,* 708 F.2d 1406, 1409 (9th Cir.) (citing *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 257 (1981)), *cert. denied,* 464 U.S. 1017 (1983); *Commodity Futures Trading Comm'n v. Savage,* 611 F.2d 270, 279 (9th Cir. 1979).

Motion to Remand

The original issue presented to us was whether Lou adequately pled a nonremovable section 17(a) Securities Act claim and if so, whether the RICO claims were "separate and independent," thereby permitting removal of the action, including the section 17(a) claim, under 28 U.S.C. § 1441(c). Section 17(a) makes it unlawful for any person offering or selling securities through means of interstate commerce to employ any device, scheme, or artifice to defraud. 15 U.S.C. § 77q(a)(1). Section 22(a) of the 1933 Securities and Exchange Act expressly forbids removal of claims under any of the sections of that Act that are brought in state courts of competent jurisdiction. 15 U.S.C. § 77v(a). The district court denied Lou's motion to remand, specifically holding that Lou failed to allege she was a purchaser or seller of securities during the critical period in question as required by *Mosher v. Kane,* 784 F.2d 1385, 1390-91 (9th Cir. 1986).

[2] After the filing of this appeal, we decided *Puchall v. Houghton, Cluck, Coughlin & Riley (In re Washington Pub. Power Supply Sys. Sec. Litig.),* 823 F.2d 1349 (9th

Cir. 1987) (en banc). In *Puchall,* we held that no private right of action exists under section 17(a) of the Securities Act of 1933. Because Lou has *no* section 17(a) cause of action in the first instance, we need not address the adequacy of her pleading. In the wake of *Puchall,* there is no statutory restriction on removing the action to federal court other than complying with the removal statute. Under 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." Lou, in alleging a private civil RICO cause of action under 18 U.S.C. § 1964(c), clearly asserted a claim within the original jurisdiction of a United States district court. This does not, however, end our analysis on the propriety of the removal. We still need to address a potential bar to removal raised by the derivative jurisdiction doctrine.

1) Derivative Jurisdiction

The derivative jurisdiction doctrine, which applies to cases filed before June 20, 1986, provides that a federal district court lacks subject matter jurisdiction over claims removed from a state court if the state court lacked subject matter jurisdiction over the claims.[1] *See Clorox Co. v. United States Dist. Court,* 779 F.2d 517, 522

[1]We note that the doctrine of derivative jurisdiction was modified by amendment to 28 U.S.C. § 1441 effective June 19, 1986. A new subsection was added:

> (e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

(9th Cir. 1985); *Dyer v. Greif Bros., Inc.*, 766 F.2d 398, 399-400 (9th Cir. 1985). If RICO jurisdiction is exclusively federal, the California state court was without subject matter jurisdiction over that cause of action. Thus, under the derivative jurisdiction doctrine, the district court also lacked jurisdiction over Lou's RICO claim, and must dismiss the claim without prejudice.[2] *See Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 24 n.27; *Clorox*, 779 F.2d at 522; *Washington v. American League of Professional Baseball Clubs*, 460 F.2d 654, 658 (9th Cir. 1972); *see also Lambert Run Coal Co. v. Baltimore & O.R.R.*, 258 U.S. 377, 382 (1922); *Dyer*, 766 F.2d at 400. On the other hand, if state and federal courts have concurrent jurisdiction over RICO claims, we may address the propriety of the removal of this action from the California state court, the subsequent section 1404 transfer, and the appropriateness of the district court's preliminary injunction order.

Pub. L. No. 99-336, § 3(a), 100 Stat. 637 (1986). The amendment, however, applies only to claims in civil actions commenced in state courts on or after June 19, 1986. *Id* § 3(b). The state court actions involved in this case were commenced prior to that date, so the derivative jurisdiction doctrine applies here.

[2]This court has described the derivative jurisdiction doctrine as:

> the kind of legal *tour de force* that most laymen cannot understand, particularly in a case where the federal court not only has subject matter jurisdiction, but has exclusive subject matter jurisdiction. One would have thought that the purpose of removal in such a case is to get the case out of the court that lacks jurisdiction to hear it and into the court that has jurisdiction . . . .

Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 658-59 (9th Cir. 1972). Congress apparently could not understand the purpose of the doctrine either. *See supra* note 1.

2) RICO Jurisdiction

[3] Whether jurisdiction over RICO claims is exclusively federal or shared concurrently with the states has been much debated in state courts and federal district courts without uniform results.[3] Neither this court nor any other federal appellate court has confronted the issue

---

[3]For decisions finding concurrent jurisdiction, *see Brandenberg v. First Md. Sav. & Loan,* 660 F. Supp. 717, 730-34 (D. Md. 1987); *Contemporary Servs. Corp. v. Universal City Studios,* 655 F. Supp. 885, 893 (C.D. Cal. 1987); *Village Improvement Ass'n v. Dow Chem. Co.,* 655 F. Supp. 311, 313 (E.D. Pa. 1987); *Carman v. First Nat'l Bank,* 642 F. Supp. 862, 864 (W.D. Ky. 1986); *HMK Corp. v. Walsey,* 637 F. Supp. 710, 717 (E.D. Va. 1986), *aff'd on other grounds,* No. 896-3582 (4th Cir. Sept. 17, 1987); *Karel v. Kroner,* 635 F. Supp. 725, 731 (N.D. Ill. 1986); *Chas. Kurz Co. v. Lombardi,* 595 F. Supp. 373, 381 n.11 (E.D. Pa. 1984); *Luebke v. Marine Nat'l Bank,* 567 F. Supp. 1460, 1462 (E.D. Wis. 1983); *Cianci v. Superior Court,* 40 Cal. 3d 903, 916, 710 P.2d 375, 382, 221 Cal. Rptr. 575, 581-82 (1985); *cf. County of Cook v. Midcon Corp.,* 773 F.2d 892, 905 n.4 (7th Cir. 1985) (doubting the reasoning of courts finding exclusive jurisdiction); *Matek v. Murat,* 638 F. Supp. 775, 783 n.6 (C.D. Cal. 1986) (noting *Cianci* with apparent approval).

For cases finding exclusive federal jurisdiction, *see Intel Corp. v. Hartford Accident & Indem. Co.,* 662 F. Supp. 1507, 1509-12 (N.D. Cal. 1987); *Spence v. Flynt,* 647 F. Supp. 1266, 1270 (D. Wyo. 1986); *Broadway v. San Antonio Shoe, Inc.,* 643 F. Supp. 584, 587 (S.D. Tex. 1986); *Massey v. City of Oklahoma City,* 643 F. Supp. 81, 84 (W.D. Okla. 1986); *Kinsey v. Nestor Exploration Ltd.-1981A,* 604 F. Supp. 1365, 1370-71 (E.D. Wash. 1985); *Levinson v. American Accident Reins. Group,* 503 A.2d 632, 635 (Del. Ch. 1985); *Thrall Car Mfg. Co. v. Lindquist,* 145 Ill. App. 3d 712, 718, 495 N.E.2d 1132, 1136 (1986); *Maplewood Bank & Trust Co. v. Acorn, Inc.,* 207 N.J. Super. 590, 594, 504 A.2d 819, 821 (1985); *Belfont Sales Corp. v. Gruen Indus. Inc.,* 112 A.D.2d 96, 100, 491 N.Y.S.2d 652, 655 (N.Y. App. Div. 1985); *Greenview Trading Co. v. Hershman & Leicher,* 108 A.D.2d 468, 473, 489 N.Y.S.2d 502, 506 (N.Y. App. Div. 1985); *Main Rusk Assocs. v. Interior Space Constructors, Inc.,* 699 S.W.2d 305, 307 (Tex. Ct. App. 1985).

of whether RICO claims may be brought in state courts, and there are persuasive arguments both for and against concurrent jurisdiction. We believe, however, that the stronger arguments favor concurrent jurisdiction.

We begin with the presumption that state courts have subject matter jurisdiction over cases arising under federal laws. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981). This presumption can be rebutted in three ways: "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Id.* at 478. We examine each of the three in turn.

a) Explicit Statutory Directive

Section 1964(c) of RICO creates the private cause of action:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c) (1982). We cannot read the word "exclusive" into section 1964's grant of federal jurisdiction over private RICO suits. Rather, "[i]t is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Gulf Offshore Co.*, 453 U.S. at 479; *see also Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506 (1962). Thus we find no explicit statutory directive serving to rebut the presumption of concurrent jurisdiction. *See Contemporary Servs.*

Corp. v. Universal City Studios, 655 F. Supp. 885, 893 (C.D. Cal. 1987).

b) Unmistakable Implication for the Legislative History

The legislative history provides "no evidence that Congress ever expressly considered the question of jurisdiction; indeed, the evidence establishes that its attention was focused solely on whether to provide a private right of action." *Cianci v. Superior Court*, 40 Cal.3d 903, 912, 710 P.2d 375, 379, 221 Cal. Rptr. 575, 579 (1985); *see also Contemporary Servs. Corp.*, 655 F. Supp. at 893. The principal draftsman of RICO, while believing that jurisdiction should not be concurrent, agrees that Congress did not expressly consider the issue; indeed, as far as he knows, " 'no one even thought of the issue.' " Flaherty, *Two States Lay Claim to RICO*, Nat'l Law J., May 7, 1984, at 3, col. 1 (quoting Professor G. Robert Blakey).[4]

While conceding that RICO's explicit legislative history offers nothing to negate the presumption of concurrent jurisdiction, proponents of exclusive jurisdiction argue that such jurisdiction should be implied because section 1964(c) was consciously modeled after section 4

---

[4]The draftsman, Professor G. Robert Blakey, argues that had Congress considered the matter, " 'they would have made [jurisdiction] exclusive.' " Flaherty, *Two States Lay Claim to RICO,* Nat'l Law J., May 7, 1984, at 3, col. 2 (quoting Professor Blakey). In support of his assertion, Blakey points to the exclusive-jurisdiction antitrust statute on which section 1964(c) was modeled and to the fact that many RICO predicate offenses are derived from federal statutes over which the federal courts have exclusive jurisdiction. *Id.* The important fact, however, is that Congress did *not* consider the question of RICO jurisdiction, and we are not at liberty to amend a statute so as to provide for circumstances that Congress has overlooked. Furthermore, we are not persuaded that an inference of exclusive jurisdiction may be drawn based on the factors suggested by Professor Blakey. *See* discussion *infra* at 12-17.

of the Clayton Act, 15 U.S.C. § 15,[5] which has been judicially construed to require exclusive federal jurisdiction. *See County of Cook v. MidCon Corp.*, 574 F. Supp. 902, 912 (N.D. Ill. 1983), *aff'd*, 773 F.2d 892 (7th Cir. 1985); *Greenview Trading Co. v. Hershman & Leicher*, 108 A.D.2d 468, 489 N.Y.S.2d 502, 504 (N.Y. App. Div. 1985). In *County of Cook*, the district court held that RICO jurisdiction was exclusively federal because "[l]egislators must have known" that section 4 of the Clayton Act gives federal courts exclusive jurisdiction and it would therefore "be anomalous . . . to hold that the jurisdictional grant in the RICO statute did anything other than create exclusive federal jurisdiction." 574 F. Supp. at 912.

In reviewing the *County of Cook* decision, the Seventh Circuit found the district court's analysis unconvincing. Although finding it unnecessary to reach the issue of RICO jurisdiction, the court stated:

> We doubt whether the analogy to antitrust law is sufficiently strong to conclude that because jurisdiction over antitrust cases is exclusively federal, RICO jurisdiction necessarily must follow suit. Particularly in light of the normal presumption that state courts share concurrent jurisdiction over federal statutes, we would be reluctant to conclude from congressional silence that Congress intended to depart from the usual rule.

773 F.2d at 905 n.4.

---

[5]At the time of RICO's enactment, section 4, provided that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained . . . ." 15 U.S.C. § 15 (1964 & Supp. V 1965-1969).

We agree with the Seventh Circuit that the patterning of RICO's section 1964(c) on section 4 of the Clayton Act does not create an "unmistakable implication" of congressional intent to confer exclusive jurisdiction. First, in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 485, 498-99 (1985), the Supreme Court rejected the argument that the relationship between section 1964(c) and section 4 warranted the application of Clayton Act requirements to section 1964(c).[6] Although *Sedima* involved standing under RICO, not jurisdiction, we take the Supreme Court's holding as a recognition that Congress' mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language. Thus, we are not convinced that, in using the Clayton Act as a model, the legislators must have known that Clayton Act jurisdiction was exclusively federal and that they intended the same exclusivity for RICO.

Second, Congress has mandated that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970). The Supreme Court has found that "if Congress' liberal-construction mandate is to be applied

---

[6]In *Sedima*, the Second Circuit:

> [a]nalogizing to the Clayton Act, which had been the model for § 1964(c), . . . concluded that just as an antitrust plaintiff must allege an "antitrust injury," so a RICO plaintiff must allege a "racketeering injury" — an injury "different in kind from that occurring as a result of the predicate acts themselves . . ./ . "

473 U.S. at 485 (quoting 741 F.2d 482, 496 (2d Cir. 1984)). The Supreme Court reversed, stating that "[i]n borrowing its 'racketeering injury' requirement from antitrust standing principles, the court below created exactly the problems Congress sought to avoid." *Id.* at 498-99.

anywhere, it is in § 1964, where RICO's remedial purposes are most evident." *Sedima,* 473 U.S. at 492 n.10. These remedial purposes would be hindered if private RICO claims were barred from state courts. Under such circumstances, victims of RICO violations could not assert RICO claims that otherwise would have been joined with state law claims in state court. We therefore agree with the California Supreme Court that the requirement of liberal construction "strongly counsel[s] us not to read the obstacle of exclusive jurisdiction into section 1964(c) on the sole basis of its similarity to section 4 of the Clayton Act." *Cianci,* 40 Cal. 3d at 913, 710 P.2d at 379, 221 Cal. Rptr. at 579.

We conclude that RICO's legislative history does not provide the requisite "unmistakable implication" that exclusive jurisdiction was intended, *See Gulf Offshore Co.,* 453 U.S. at 478; *see also HMK Corp. v. Walsey,* 637 F. Supp. 710, 717 (E.D. Va. 1986) (finding that Congress patterned RICO after the Clayton Act "simply to encourage enforcement of RICO by private citizens" and that because "RICO differs greatly from federal antitrust, the need for exclusive federal jurisdiction under the antitrust statutes cannot justify a similar result under RICO"), *aff'd on other grounds,* No. 86-3582 (4th Cir. Sept. 17, 1987).

c) Clear Incompatibility Between State Court Jurisdiction and Federal Interests.

In *Kinsey v. Nestor Exploration Ltd.-1981A,* 604 F. Supp. 1365, 1370-71, (E.D. Wash. 1985), the court held RICO jurisdiction to be exclusively federal because sections of the RICO statute other than section 1964(c) are tied to federal laws and federal enforcement. The *Kinsey* court did "not believe it appropriate to dissect a statutory scheme, select one narrow provision thereof, and deter-

mine with respect to that one provision at least, congressional silence is the equivalent of an affirmative grant of jurisdiction." *Id.* There are three problems with this analysis. First, jurisdiction does not require an affirmative grant; rather, jurisdiction is presumptively concurrent absent factors rebutting the presumption. *Gulf Offshore Co.,* 453 U.S. at 477-78. Second, RICO is not tied solely to federal laws. The *Kinsey* court correctly noted that section 1961 defines the "predicate acts" necessary to make out a RICO violation in terms of federal law. 604 F. Supp. at 1370; 18 U.S.C. § 1961(1)(B)-(D) (1982 & Supp. III 1985). However, it failed to mention that section 1961 also provides that violations of state criminal laws serve as RICO predicate acts, thereby incorporating state as well as federal law into RICO. 18 U.S.C. § 1961(1)(A) (1982 & Supp. III 1985).

Third, while much of the RICO statute concerns criminal and civil enforcement by federal officials, we disagree with the *Kinsey* court that private enforcement actions, under section 1964(c), must therefore be heard only in federal courts. As discussed above, *see supra* at 13, the Supreme Court in *Sedima* declined to read federal antitrust requirements into RICO; however, the Court thought Congress' reliance on the Clayton Act, "under which private and governmental actions are entirely distinct," was relevant in interpreting section 1964(c). 479 U.S. at 489. If private and government actions under a RICO are "entirely distinct."[7] there is no reason to read the federalized aspects of the statute into section 1964(c). Thus, we do not find that the internal structure

---

[7]It, of course, makes perfect sense that a federal statute should provide for *governmental* enforcement only by federal officials and describe such enforcement in terms of federal courts. This fact tells us nothing, however, about the scope of private enforcement.

of RICO creates a "clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore Co.*, 453 U.S. at 478.

Nor do we find that federal interests will be jeopardized by state-court adjudication of private RICO claims. The only strong argument supporting an incompatibility between state and federal jurisdiction is that federal courts have exclusive jurisdiction over several RICO predicate acts. *See HMK Corp.*, 637 F. Supp. at 717. We agree with *HMK Corp.* that this fact is insufficient to rebut the presumption of concurrent jurisdiction:

> First, in adjudicating a RICO case, state courts only need determine whether the alleged predicate acts did or did not occur. This type of factual finding is unlikely to involve any complex interpretation of the underlying federal statutes, which would require exclusive jurisdiction. Second, as a practical matter, state courts are unlikely to find themselves in the position of interpreting and applying the underlying federal statutes. The vast majority of RICO cases involve garden variety state law fraud, where the plaintiff has simply seized upon RICO to obtain federal jurisdiction, treble damages, and attorney fees. If anything, RICO involves federal courts in the adjudication of state law claims, rather than the other way around.

Id.; see also Cianci, 40 Cal. 3d at 915, 710 P.2d at 381, 221 Cal. Rptr. at 581 (finding that federal judges do not necessarily have superior expertise over RICO claims because the RICO predicate acts include state and federal violations and, "[w]hile federal judges must be presumed to have greater expertise over the latter, state judges must be presumed to have greater expertise over the [former]").

[4] In sum, we find none of the factors necessary to rebut the presumption of concurrent jurisdiction of section 1964(c) claims. Our conclusion is strengthened by the requirement that we afford a liberal construction to RICO generally, Pub. L. No. 91-452, § 904(a), 84 Stat. at 947, and to section 1964(c) in particular. *Sedima,* 473 U.S. at 492 n. 10. Providing a private plaintiff with a choice of fora encourages enforcement of RICO and preserves an appropriate role for state courts in cases involving essentially state law. We are convinced that the purposes behind the grant of a private right of action are best served by concurrent jurisdiction. *See id.* at 493 ("Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps.").

[5] Our holding of concurrent jurisdiction over RICO claims disposes of any barrier erected by the derivative jurisdiction doctrine. The district court denied Lou's motion to remand for reasons that have become irrelevant in light of *Puchall.* We may, however, affirm the district court's decision on any ground finding support in the record. *See Smith v. Block,* 784 F.2d 993, 996 n.4 (9th Cir. 1986); *Bruce v. United States,* 759 F.2d 755, 758 (9th Cir. 1985), *cert. denied,* 107 S. Ct. 580 (1986). Accordingly, we hold that the district court correctly denied the motion to remand.

Appeal of the Motion to Transfer

[6] Lou argues that the district court abused its discretion by transferring this action without due regard to Lou's choice of forum. The district court transferred Lou's action to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1404(a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district

court may transfer any civil action to any other district or division where it might have been brought."

[7] Although great weight is generally accorded plaintiff's choice of forum, *Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp.,* 579 F.2d 561, 567 (10th Cir. 1978), when an individual brings a derivative suit or represents a class, the named plaintiff's choice of forum is given less weight. *Helfant v. Louisiana & Southern Life Ins. Co.,* 82 F.R.D. 53, 58 (E.D.N.Y. 1979); *Stolz v. Barker,* 466 F. Supp. 24, 27 (M.D.N.C. 1978). In judging the weight to be accorded Lou's choice of forum, consideration must be given to the extent of both Lou's and the Belzbergs' contacts with the forum, including those relating to Lou's cause of action. *Pacific Car & Foundry Co. v. Pence,* 403 F.2d 949, 954 (9th Cir. 1968). If the operative facts have not occurred within the forum and the forum has no interest in the parties or subject matter, Lou's choice is entitled to only minimal consideration. *Id.*

[8] After an exhaustive review of the record the district court concluded that: (1) the stock purchase agreement was negotiated and executed in New York, (2) the majority of the witnesses live and work in the New York area where they are subject to subpoena, (3) all the defendants are subject to personal jurisdiction in New York, and (4) the costs of litigation would be drastically reduced if the case were heard in New York. Based on these factors, we find that the district court did not abuse its discretion in deciding to transfer this action pursuant to 28 U.S.C. § 1404(a).

Preliminary Injunction

[9] As a final matter, we must determine whether the district court properly enjoined the *Mickler* state court

proceedings. The Anti-Injunction Act, 28 U.S.C. § 2283 (1982), provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Belzbergs argue that the district court appropriately granted injunctive relief under the "necessary in aid of its jurisdiction" exception and the "expressly authorized" exception. 28 U.S.C. § 2283. We disagree. We note that the exceptions to the Anti-Injunction Act must be construed narrowly and doubts as to the propriety of a federal injunction against a state court proceeding should be resolved in favor of permitting the state action to proceed. *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 630 (1977) (plurality opinion); *Alton Box Bd. Co. v. Esprit De Corp.,* 682 F.2d 1267, 1271 (9th Cir. 1982). Unless one of the statutory exceptions applies, a federal injunction restraining prosecution of a lawsuit in state court is absolutely prohibited. *Mitchum v. Foster,* 407 U.S. 225, 228-29 (1972). *See also Alton Box,* 682 F.2d at 1271.

1) "Necessary in Aid of Its Jurisdiction" Exception

[10] The general rule under the "necessary in aid of its jurisdiction" exception is that where state and federal courts have concurrent jurisdiction over a case, neither court may prevent the parties from simultaneously pursuing claims in both courts. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs,* 398 U.S. 281, 295 (1970). "Necessary in aid of" is "similar to the concept of injunctions to 'protect or effectuate' judgments." *Id.* Neither exception applies unless injunctive relief is "necessary to prevent a state court from so interfering with a

federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Id.* The mere existence of a parallel action in state court does not rise to the level of interference with federal jurisdiction necessary to permit injunctive relief under the "necessary in aid of" exception. *See Alton Box,* 682 F.2d at 1272-73. Accordingly, this exception is not applicable here. The cases cited by the Belzbergs in support of their position are inapposite because they involve injunctions obtained after final judgments or in situations where the state proceedings would impair seriously pending settlements in the federal actions.

2) "Expressly Authorized" Exception

[11] Title 28 U.S.C. § 1446(e) (1982) provides that upon removal to federal court, "the State court shall proceed no further unless and until the case is remanded." This prohibition has been construed as an express congressional authorization to enjoin or stay the state court proceedings. In fact, this injunctive power was established long before the "expressly authorized" exception to the Anti-Injunction Act was added in 1948.

Justice Stewart discussed the anti-injunction statute in *Mitchum v. Foster,* 407 U.S. at 234:

> in addition to the bankruptcy law exception that Congress explicitly recognized in 1874, the Court through the years found that federal courts were empowered to enjoin state court proceedings, despite the anti-injunction statute, in carrying out the will of Congress under at least six other federal laws. These covered a broad spectrum of congressional action:

(1) legislation providing for removal of litigation from state to federal courts, . . . [12]

---

[12] *French v. Hay,* 22 Wall. 250 [1875]; *Kline v. Burke Construction Co.,* 260 U.S. 226 [1922]. The federal removal provisions, both civil and criminal, 28 U.S.C. §§ 1441-1450, provide that once a copy of the removal petition is filed with the clerk of the state court, the "State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(e).

More recently, in *Vendo Co.,* Justice Rehnquist, writing for the plurality, cited 28 U.S.C. § 1446(e) as an example of a statute that, while not directly referring to 28 U.S.C. § 2283, nonetheless *explicitly authorized* injunctive relief against state court proceedings. 433 U.S. at 640.

It is thus clear that a federal court may enjoin the continued prosecution of the same case in state court after its removal. A more difficult problem is presented when a new action is filed in state court. In a case decided prior to the 1948 amendment to the Anti-Injunction Act, *Honolulu Oil Corp. v. Patrick,* 71 F.2d 654 (9th Cir. 1934), we approved the denial of an injunction against a second action filed in state court after removal of a prior suit. The new suit reduced the claim below the amount required for removal and joined two non-diverse defendants. We need not decide whether, under its particular facts, *Honolulu Oil Corp.* remains viable, because we conclude that in any event, the injunction against the *Mickler* suit was improvidently granted.

The Belzbergs cite Fifth Circuit authority to support their contention that an injunction is expressly authorized by 28 U.S.C. § 1446(e). *Frith v. Blazon-Flexible Flyer, Inc.,* 512 F.2d 899, 901 (5th Cir. 1975) (per curiam). *Frith,* however, vacated an injunction prohibiting the plaintiff from prosecuting his state court action.

Rather than supporting Belzberg, *Frith* holds that "where no fraud is found, the second action brought in state court should not be enjoined." *Id. See Jett v. Zink*, 474 F.2d 149 (5th Cir.), *cert. denied*, 414 U.S. 854 (1973); *Parks v. New York Times Co.*, 308 F.2d 474 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964). The court did state that "where a district court finds that a second suit filed in state court is an attempt to subvert the purposes of the removal statute, it is justified and authorized by § 1446(e) in enjoining the proceedings in the state court." 512 F.2d at 901. It would be of little value to enjoin continuance of a state case after removal and then permit the refiling of essentially the same suit in state court. We agree with the Fifth Circuit that where a second state court suit is fraudulently filed in an attempt to subvert the removal of a prior case, a federal court may enter an injunction.

[12] The district court in the case before us made no finding that the second state court action was fraudulent or an attempt to subvert the purposes of the removal statute. We believe that such a finding would be clearly erroneous. The *Mickler* case involves different plaintiffs, additional counsel, additional defendants, and only state claims. We conclude that under these circumstances the preliminary injunction was not authorized by section 1446(e).

Because the preliminary injunction does not fall under any exception to 28 U.S.C. § 2283, the "anti-injunction law absolutely prohibits . . . all federal equitable intervention in a pending state court proceeding . . . . " *Mitchum*, 407 U.S. at 229.

CONCLUSION

We hold that state courts have concurrent jurisdiction over RICO causes of action under 18 U.S.C. § 1964(c). As such, the derivative jurisdiction doctrine does not prevent the removal of Lou's action to federal court. We affirm the district court's denial of Lou's motion to remand. Further, we affirm the district court's section 1404 transfer of the case to New York. We reverse, however, the district court's granting of a preliminary injunction against Mickler's state court action as it does not fall under any exception to the Anti-Injunction Act.

Each party shall bear its own costs.

AFFIRMED in part, REVERSED in part, and REMANDED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM OF DECISION AND ORDER THEREON

Case No. 86-2465 DT (Px)

A. JACQUES LOU,
Plaintiff,
v.
WILLIAM BELZBERG, *et al.*,
Defendants,
ASHLAND OIL, INC.,
Nominal Defendant.

The above-entitled matter came on for hearing on the 12th of May, 1986 on: (1) Plaintiff, A. Jacques Lou's Motion to Remand and (2) Defendants, William Belzberg, Drexel Burnham Lambert Incorporated and Ashland Oil, Inc.'s Motion to Change Venue pursuant to 28 U.S.C. § 1404(a), or, in the alternative, to Dismiss for Refiling pursuant to the doctrine of *forum non conveniens.*

PLAINTIFF'S MOTION TO REMAND

Plaintiff, A. Jacques Lou, brought the present motion to remand this case back to Superior Court of the State of California for the County of Los Angeles on the grounds that Section 17(a) of the Securities Act of 1933 does not authorize removal of the within action and the Racketeer Influenced and Corrupt Organization Act (hereinafter "RICO") counts are not "separate and independent" from the Section 17(a) claim. This Court denies plaintiff's Motion to Remand.

This Court specifically finds that an implied private right of action pursuant to Section 17(a) of the Securities

Act of 1933 does exist in this jurisdiction. *See Mosher v. Kane*, 784 F.2d 1385, 1388 (9th Cir. 1985). However, after a careful review of the plaintiff's complaint originally filed in the Superior Court of the State of California for the County of Los Angeles on April 9, 1986, this Court finds that plaintiff has, on the face of the pleadings, improperly pled a Section 17(a) cause of action because plaintiff has failed to allege that plaintiff was a purchaser or seller of securities during the critical period in question in which the transactions complained of herein took place. The Complaint merely provides that plaintiff was a shareholder during the period in question. Similarly, plaintiff's class definition is "all persons who *owned* Ashland common stock on April 1, 1986" and not those who purchased or sold in reliance on some alleged Section 17(a) violation. Therefore, because of plaintiff's status and the status of the class members as mere shareholders at the time of the alleged transactions alluded to as "green mail", plaintiff has not pleaded a Section 17(a) claim. *Wright v. Heizer Corporation*, 411 F. Supp.23, 35 (N.D. Ill.1975). Accordingly, plaintiff's claims do not provide a basis to bar removal under Section 22(a) of the Securities Act of 1933.

Another key issue is whether the RICO causes of action are "separate and independent" from the Section 17(a) claim thus affording jurisdiction to this Court pursuant to 28 U.S.C. § 1441(c). Plaintiff cites several different courses of conduct involving defendants alleged corporate take-overs as evidence of plaintiff's RICO causes of action. These actions involve different parties and different corporate transactions and those transactions are wholly unrelated to the present transaction. Under these facts as presently pled, the RICO counts and the Section 17(a) claim are in fact "separate and independent" because different factual proof is necessarily required and

the protections afforded are fundamentally different. Therefore, plaintiff's Motion to Remand back to the Superior Court of the State of California for the County of Los Angeles is denied.

DEFENDANTS MOTION TO CHANGE VENUE PURSUANT TO 28 U.S.C. § 1404(a)

Defendants, William Belzberg, Ashland Oil, Inc., and Drexel Burnham Lambert, Inc., brought a motion to change the venue of the present case to the Southern District of New York pursuant to 28 U.S.C. § 1404(a) or in the alternative to dismiss for refiling pursuant to the doctrine of *forum non conveniens*. This Court has considered the Defendants' Motion to Change Venue pursuant to 28 U.S.C. § 1404(a). Defendants based their said motion on several grounds: (1) the stock repurchase agreement was negotiated and executed in New York; (2) all defendants will be subject to personal jurisdiction in New York; (3) the majority of the witnesses to the stock repurchase agreement live and work in the New York area and are subject to subpeona; and (4) the costs of litigation would be drastically reduced if heard in New York. This Court agrees.

28 U.S.C. § 1404(a) provides that "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Courts must assess the effect of a transfer on the availability of witnesses and their live testimony in determining the effect on the convenience witnesses. *Los Angeles Memorial Coliseum v. National Football League*, 89 F.R.D. 497, 501 (C.D. Cal. 1981); *Cambridge Filter Corp. v. International Filter Co. Inc.*, 548 F. Supp. 1308, 1311 (D. Nev. 1982). The convenience of witnesses is the primary concern in deciding a transfer motion. *National Football*

League, 89 F.R.D. at 501; *Cambridge*, 548 F. Supp. at 1311. Although generally great weight is accorded plaintiff's choice of forum (*Texas Eastern Transmission Corp. v. Marine-Office Appelton & Cox Corp.*, 579 F.2d 561, 567 (10th Cir. 1978); *Girsh v. Jepson*, 355 F. Supp. 1104, 1106 (E.D. Pa. 1973)), when a plaintiff brings a derivative suit or represents a class the choice of forum is given less weight. *Stolz v. Barker*, 466 F. Supp. 24, 27 (M.D.N.C. 1978); *Harris v. American Investment Co.*, 333 F. Supp. 325, 326 (E.D. Pa. 1971); *Firmani v. Clarke*, 325 F. Supp. 689, 691 (D. Del. 1971); *Helfant v. Louisiana & Southern Life Insurance Co.*, 82 F.R.D. 53, 58 (E.D.N.Y. 1979).

After an exhaustive review of the record, this Court finds that the defendants have shown that it is in the interest of justice, the convenience of the witnesses and the parties to have the present matter adjudicated before the United States District Court of the Southern District of New York. It is hereby ordered that the defendant's motion to change venue pursuant to 28 U.S.C. § 1404(a) is granted and the within matter is transferred forthwith to the United States District Court for the Southern District of New York.

Dated: May 14, 1986

DICKRAN TEVRIZIAN,
Judge, United States District Court
Central District of California

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:
WASHINGTON PUBLIC POWER SUPPLY
SYSTEM SECURITIES LITIGATION.

HENRY PUCHALL, et al.,
Plaintiffs-Appellants,

v.

HOUGHTON, CLUCK, COUGHLIN & RILEY, et al.,
Defendants-Appellees.

No. 86-3594

D.C. No.
MDL No. 551
C-83-1080 Western Washington (Seattle)

OPINION

Argued En Banc and Submitted
April 21, 1987 — San Francisco, California

Filed July 30, 1987

Before: Goodwin, Kennedy, Anderson, Tang, Nelson, Norris, Hall, Wiggins, Brunetti, Kozinski, and Thompson
Circuit Judges

Opinion by Judge Hall; Dissent by Judge Tang

Appeal from the United States District Court
for the Western District of Washington
William D. Browning,* District Judge, Presiding

---

*The Honorable Judge Browning of the District of Arizona is sitting by designation in the Western District of Washington for these proceedings.

SUMMARY

SECURITIES

Appeal from a holding that a private action will not lie under section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a). Affirmed by the court in banc.

In 1982, the Washington Public Power Supply System (WPPSS) defaulted on bonds that it had sold to finance construction of nuclear power plants. Appellants, purchasers of those bonds, filed a class action against WPPSS and nearly 200 others, alleging that the bonds were sold "on false pretenses" in violation of both federal and state securities law. Ruling that the claims asserted under section 17(a) of the Securities Act of 1933 (the Act) would not lie because that section did not provide a private cause of action, the district court dismissed all section 17(a) claims. An interlocutory appeal from this dismissal was granted.

[1] In determining whether a private remedy is implicit in a statute not expressly providing one, the following factors are most important: First, is the plaintiff one of the class for whose especial benefit the statute was enacted? Second, is there any indication of legislative intent either to create such a remedy or deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy in the plaintiff? [2] Here, the language of section 17(a) reveals no intent to create a private remedy. It merely represents a general censure of fraudulent practices. [3] Although appellants may be correct that section 17(a) was enacted for the especial benefit of investors, [4] they have failed to provide evidence of legislative intent to create a private remedy under section 17(a). [5] Moreover, implying a private right of action under section 17(a) is inconsistent with the statutory scheme of the Act, and the presence of

express civil remedies within the same act militates against a finding of Congressional intent to imply further remedies. [6] Finally, because no overwhelming consensus ever existed in section 17(a) judicial precedent, it cannot be inferred that Congress intended — by its silence — to reaffirm a judicial consensus whenever it comprehensively reexamined and amended the Act. [7] Because it is decided that no private action lies under section 17(a), prior decisions to the contrary in *Mosher v. Kane,* 784 F.2d 1385 (9th Cir. 1986), and *Stephenson v. Caloine Conliers II, Ltd.*, 652 F.2d 808 (9th Cir. 1981), are reversed.

Believing that the majority's decision is not consonant with the fundamental purposes of securities law, the dissent would adhere to stare decisis.

COUNSEL

Leonard B. Simon, New York, New York, for the plaintiffs-appellants.

Daniel R. Murdock, Herbert M. Wachtell, New York, New York, and Michael Sandler, Seattle, Washington, for the defendants-appellees.

OPINION

HALL, Circuit Judge:

I.

Between 1977 and 1981, the Washington Public Power Supply System (WPPSS) sold bonds with a face value of $2.25 billion to finance construction of two nuclear power plants. In 1982 WPPSS ceased construction of these plants and thereafter defaulted on the bond payments. In 1983 plaintiffs-appellants, purchasers of WPPSS bonds,

filed a class action on behalf of themselves and all others who purchased the bonds between February 23, 1977 and June 15, 1983, against WPPSS and nearly 200 other defendants alleging that the bonds were sold "on false pretenses" in violation of both federal and state securities laws.

District Judge Richard Bilby denied a motion by defendants to dismiss the plaintiffs' claims under section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a). Thereafter, Judge Bilby noted that he must recuse himself. The case was then transferred to District Judge William Browning, who vacated Judge Bilby's ruling on the section 17(a) claims. Judge Browning concluded that "in litigation as massive and complex as this, a record as unimpeachable as possible was essential." *In re Washington Public Power Supply System Securities Litigation*, 623 F.Supp. 1466, 1470 (W.D. Wash. 1985). He therefore decided to "revisit" Judge Bilby's substantive rulings, including the ruling on section 17(a). *Id.*

On December 3, 1985, Judge Browning granted the defendants' motion to dismiss all section 17(a) claims. *Id.* at 1474-76. Judge Browning certified his interlocutory order for immediate appeal pursuant to 28 U.S.C. § 1292(b), stating that his ruling was "in apparent conflict with existing Ninth Circuit authority, and it involves a controlling issue of law as to which there is substantial ground for difference of opinion, and an immediate appeal may materially advance the litigation" *Id.* at 1476. Plaintiffs timely petitioned this court for permission to file an interlocutory appeal, which petition this court granted.

Plaintiffs then moved this court for summary reversal of the district court's order dismissing their section 17(a) claims. This court granted the plaintiffs' motion for summary reversal relying on *Mosher v. Kane*, 784 F.2d 1385

(9th Cir. 1986), and *Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 815 (9th Cir. 1981). Thereafter we granted a suggestion for rehearing en banc to decide whether to overrule these two cases. Having considered the briefs and oral argument, we address the following question: Will a private action lie under section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a)?

II.

In our earlier decisions of *Stephenson*, 652 F.2d at 815, and *Mosher*, 784 F.2d at 1390 n.9, we had found the existence of a private right of action under section 17(a).[1] Plaintiffs contend that these decisions were correctly reasoned and that the principle of stare decisis weighs against reaching a contrary holding in the absence of Supreme Court guidance on the issue. Bearing this in mind, we now reexamine the reasoning supporting *Stephenson* and its progeny and we review the impact that those cases have had on the jurisprudence of our circuit.

---

[1]Section 17(a) provides:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly —
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a)(1981).

We conclude the *Stephenson* and *Mosher* were incorrectly decided and are no longer controlling precedent in this circuit.

In *Stephenson,* we were presented with an appeal from a summary judgment for the defendants in a private action for damages brought under various sections of the federal securities laws. The plaintiffs' fourth cause of action alleged a claim under section 17(a). After stating that the Supreme Court had not decided the issue, we held that a private right of action existed because of authority for that proposition emanating from the Second Circuit. *Stephenson,* 652 F.2d at 815 (citing *Kirshner v. United States,* 603 F.2d 234, 241 (2d Cir. 1978), *cert. denied,* 442 U.S. 909 (1979); *SEC v. Texas Gulf Sulphur Co.,* 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J. concurring), *cert. denied,* 394 U.S. 976 (1969)).

In reaching this conclusion, we did not fully examine the reasons underlying the Second Circuit's ruling nor did we apply the Supreme Court's analysis in *Cort v. Ash,* 422 U.S. 66 (1975). In particular, in *Stephenson,* our court did not consider (1) Judge Friendly's reliance on the assumed applicability in section 17(a) cases of the scienter standard required in private actions under section 10(b) of the Securities Exchange Act of 1934 and (2) the implications of the Supreme Court's adoption of a scienter standard for use in section 17(a)(1) cases and a negligence standard for use in actions brought under sections 17(a)(2) and (3), as set forth in *Aaron v. SEC,* 446 U.S. 680, 701-02 (1979). Our court also did not engage in any attempt to distinguish among the three subsections of section 17(a) in order to discern whether a private action could exist for one subsection but not for another. Indeed, with the exception of the citation to sister circuit authority, we did not engage in any attempt

to analyze the intent of Congress with respect to the existence of private actions under section 17(a).[2]

We now recognize that our court's citation to Second Circuit authority misinterpreted that authority. In *Stephenson,* we quoted language appearing in *Kirshner* which itself was a flawed restatement of the issue addressed by Judge Friendly in his *Texas Gulf Sulphur* concurrence. *Stephenson* and *Kirshner* relied solely on a portion of the following argument from *Texas Gulf Sulphur.*

> Once it had been established, however, that an aggrieved buyer has a private action under § 10(b) of the 1934 Act, there seemed little practical point in denying the existence of such an action under § 17 — with the important proviso that fraud, as distinct from mere negligence, must be alleged.

401 F.2d at 867. In *Stephenson,* our court misquoted Judge Friendly, as did the Second Circuit in *Kirshner,* omitting "the important proviso that fraud, as distinct from mere negligence, must be alleged." *See Stephenson,* 652 F.2d at 815; *Kirshner,* 603 F.2d at 241.

The omission has grown in importance as the standard of conduct governing actions under the federal securities laws has become more refined. In *Aaron,* 446 U.S. at 695-97, the Supreme Court held that negligence — and not scienter — suffices to support a SEC injunction action under sections 17(a)(2) and (a)(3).[3] The *Aaron* decision

---

[2]*See Bruns v. Ledbetter,* 583 F. Supp. 1050, 1053 (S.D. Cal. 1984).

[3]*Aaron* was a public SEC enforcement action under section 17(a). The Supreme Court has not decided whether the same standard would apply in a private section 17(a) action or even whether a private section 17(a) action exists. *See Bateman Eichler, Hill Richards, Inc. v. Berner,* 472 U.S. 299, 304 n.9 (1985); *Herman & MacLean v. Huddleston,* 459 U.S. 375, 378 n.2 (1983); *International Brotherhood of Teamsters v. Daniel,* 439 U.S. 551, 557 n.9 (1979); *Blue Chip Stamps*

suggests that if section 17(a) could support any implied action, a scienter standard would govern only a private section 17(a)(1) action. As the Supreme Court earlier held, a private section 10(b) action is governed by the Scienter standard only because Congress so intended. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 208-10 (1976). Since the *Aaron* Court held that the language of section 17(a) revealed that Congress did not intend to limit sections 17(a)(2) and (3) to actions alleging scienter, the same rule should apply to private actions.

In *Stephenson,* we relied on "the minimal differences between § 17(a) of the 1933 Act and § 10(b) of the 1934 Act." 652 F.2d at 815.[4] *Aaron* dispels any expectation of uniformity in the treatment of section 17(a) and section 10(b). 446 U.S. at 695-97. The difference in the standards would have the practical effect of eliminating any need to show scienter or, for that matter, to proceed under section 10(b). The likelihood that these differences would have such an important practical effect existed at the time *Stephenson* was decided. However, because our opinion relied categorically on citations to *Kirshner* and *Texas Gulf Sulphur,* it is apparent that we did not perceive the problem. Although we were not aware of it at the time, in establishing a private right of action under sections 17(a)(2) and (3), for which an allegation of fraud would likely not be required, our court was exceeding the limits of the cited authority and embarking on a course fraught with danger.

---

v. Manor Drug Stores, 421 U.S. 723, 734 n.6 (1975); *see also Mosher v. Kane,* 784 F.2d 1385, 1390 n.9 (9th Cir. 1986).

[4]*See also Kirshner v. United States,* 603 F.2d 234, 241 (2d Cir. 1978) ("[T]here was little practical point in denying the existence of an action under § 17 once it is established that an aggrieved buyer has a private action under § 10(b)."), *cert. denied,* 442 U.S. 909 (1979).

We relied on *Stephenson* in two later cases without any significant reexamination of the issue. In *Feldman v. Simkins Industries, Inc.*, 679 F.2d 1299, 1305 (9th Cir. 1982), we stated that for purposes of disclosure duties, sections 10(b) and 17(a) could be viewed as "coterminous." In *Mosher*, 784 F.2d at 1390 n.9, after recognizing the fact that various circuits have split on the issue, we followed *Stephenson* and recognized an implied right of action because we believed that it was "the better view." It is evident, however, that neither of the cases we have decided since *Stephenson* add support to its holding. In fact, the three cases, *Stephenson, Feldman,* and *Mosher,* are properly treated as turning solely on a misreading of Second Circuit authority which has been undermined by the Supreme Court's decision in *Aaron*.[5]

---

[5]Plaintiffs point to decisions in other circuits, which uphold an implied private right of action under section 17(a), as persuasive authority. A review of the circuits, however, shows a tendency to disallow a private right of action. Even those circuits which had implied private actions have recently reversed or modified their prior positions. The Fifth Circuit, applying the *Cort v. Ash* analysis, flatly rejected private section 17(a) actions in *Landry v. All American Assurance Co.*, 688 F.2d 381, 387-91 (5th Cir. 1982). The Eighth Circuit squarely reaffirmed its rule that "there is no private right of action for violations of § 17(a)" in *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326, 328 (8th Cir. 1986). *See also Brannan v. Eisenstein*, 804 F.2d 1041, 1043 n.1 (8th Cir. 1986). The Tenth Circuit expressed "considerable doubt" as to whether a private right of action exists under section 17(a) in *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 689 n.1 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981). The Second Circuit has indicated a willingness to reexamine *Kirshner* in which it held that the "minimal differences" between section 10(b) and section 17(a) justified implying a private action under section 17(a). *See Yoder v. Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555, 559 n.3 (2d Cir. 1985). The Fourth Circuit has also indicated a lack of confidence in its prior recognition of a private section 17(a) cause of action. *See SEC v. American Realty Trust*, 586 F.2d 1001, 1006-07 (4th Cir. 1978). The Seventh Circuit

III.

The Supreme Court, in *Cort v. Ash*, 422 U.S. 66 (1975), set out the analysis to be applied in determining whether a private remedy is implicit in a statute not expressly providing one:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (emphasis in original; citations omitted).

---

has declared that the issue is now an "open question." *Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522, 530-31, (7th Cir. 1985); *see also Ray v. Karris*, 780 F.2d 636, 641 n.3 (7th Cir. 1985). Although the Third Circuit has yet to address the issue, the clear trend among the district courts of that circuit has been against implying a private right of action under § 17(a). *Mursau Corp. v. Florida Penn Oil & Gas, Inc.*, 638 F.Supp. 259, 261 (W.D. Pa. 1986), *aff'd* (without opinion), 813 F.2d 398 (3d Cir. 1987) (No. 86-3417); *see also Pennington v. Thomas McKinnon Securities, Inc.*, No. 86-3672 (E.D. Pa. Dec. 24, 1986) (available on *Westlaw*). Moreover, in carefully reasoned opinions, the Supreme Court of Delaware and two New York State appellate courts have recently refused to imply a private action under section 17(a). *Mann v. Oppenheimer & Co.*, 517 A.2d 1056 (Del. 1986); *CPC International, Inc. v. McKesson Corp.*, 120 A.D.2d 221, 507 N.Y.S.2d 984 (N.Y. App. Div. 1986), *appeal granted*, 69 N.Y.2d 607, 507 N.E.2d 321 N.Y. 1987); *Mauersberg v. E.F. Hutton & Co.*, 116 A.D.2d 417, 501 N.Y S.2d 748 (N.Y. App. Div. 1986).

[1] The Supreme Court recently reaffirmed *Cort v. Ash* and emphasized that the second and third factors — congressional intent and statutory consistency — constitute the " 'essential predicate for implication of a private remedy.' " *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 145 (1985) (quoting *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. 77, 94 (1981)).

Plaintiffs must establish that Congress intended to provide for the private remedy which they ask us to imply or at least that it is consistent with the legislative scheme. While a private remedy may be inferred from the plain language of the statute, the statuory structure, or some other source, we " 'will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide,' " even if the plaintiff can show that he is a member of the class for whose benefit the statute was enacted and that there is no state-law impediment to implication of a remedy. *Id.* (quoting *California v. Sierra Club,* 451 U.S. 287, 297 (1981)).[6]

[2] We first examine the language of section 17(a) in light of the legislative history and statutory structure of the Securities Act of 1933. *See Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 15-18 (1979); *Landry v. All American Assurance Co.,* 688 F.2d 381, 389 & n.31 (5th Cir. 1982). The language of section 17(a) reveals no intent to create a private remedy. It merely represents a general censure of fraudulent practices. *Landry,* 688 F.2d at 389.[7] Indeed, Congress provided the Securities Ex-

---

[6] *See Touche Ross & Co. v. Redington,* 442 U.S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.").

[7] *See also Shull v. Dain, Kalman & Quail, Inc.,* 561 F.2d 152, 155 (8th Cir. 1977) ("Section 17(a) . . . does not confer in [its] terms a private cause of action in favor of a person who purchases a security

change Commission (SEC) with specific procedures to enforce section 17(a) in sections 20 and 24, indicating that Congress did not intend to create private remedies under section 17(a), but rather that Congress sought to supplement the protections afforded to investors under sections 5, 11, and 12 by giving the Commission the power to deal with flagrant cases of abuse by means of sections 17, 20, and 24.[8]

[3] Plaintiffs nevertheless contend that section 17(a) satisfies the first requirement of the *Cort v. Ash* test, that is, that section 17(a) was enacted for the "especial benefit" of investors and therefore creates "a federal right in favor of the plaintiff[s]." *Cort v. Ash*, 422 U.S. at 78. We need not decide whether the first prong of *Cort v. Ash* is satisfied.[9] Even if the first factor were satisfied, we find that the plaintiffs have failed to clear the second and the third *Cort v. Ash* hurdles, that is, plaintiffs have failed to provide evidence of legislative intent to create or reaffirm a private remedy under section 17(a) and plaintiffs have failed to show that such a private remedy would

---

that has been sold to him in violation of [that] section."), *cert. denied*, 434 U.S. 1086 (1978).

[8] *See* Ruder, *Civil Liability Under Rule 10b-5: Judicial Revision of Legislative Intent?*, 57 Nw. U.L. Rev. 627, 656-57 & nn. 132-35 (1963) (discussing Memorandum of Senator Fletcher, agreed to by the Senate, 78 Cong. Rec. 8711-13 (1934), and Amicus Brief of the SEC in *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953)).

[9] *Compare United States v. Naftalin*, 441 U.S. 768, 776 (1979) ("investor protection was a constant preoccupation of the legislators" who enacted the Securities Acts) *with Landry v. All American Assurance Co.*, 688 F.2d 381, 389 [5th Cir. 1982) ("On its face, § 17(a) does not appear to satisfy the first factor of the *Cort* test, for the statutory language does not suggest a private cause of action. The statute merely represents a general censure of fraudulent practices; only subsequent provisions enable equitable and criminal causes of action.").

be consistent with the purposes underlying the legislative scheme of which section 17(a) is a part. As the Supreme Court declared in *Russell*, a failure to satisfy these two factors is determinative. 473 U.S. at 145; *id.* at 154 n.11 (concurring opinion).

[4] In face of the plain language of section 17(a), there is no reason to infer a private remedy in favor of some individuals where "Congress, rather than drafting the legislation 'with an unmistakable focus on the benefited class,' instead has framed the statute simply as a general prohibition." *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 772 (1981) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 691 (1979)).[10] Moreover, Congress' inclusion of sections 11 and 12 of the Securities Act shows that when Congress wished to provide a private damages remedy, it knew how to do it and it did so expressly. *Coutu*, 450 U.S. at 773; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979). Plaintiffs point out that all of the antifraud provisions of the Securities Act are specifically designed to protect investors, relying on *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299 (1985). However, unlike the situation present in *Bateman Eichler*, wherein the SEC notified the Court that violations of the law would go undetected if the plaintiffs there were without any private right of action, barring private actions under section 17(a) would not "inexorably result in a number of alleged fraudulent practices going undetected by the authorities and unremedied." *Id.* at 315. Plaintiffs here can pursue (and indeed are pursuing)

---

[10] *See also Touche Ross*, 442 U.S. at 568 ("[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. Instead, our task is limited solely to determining whether Congress intended to create the private right of action asserted.") (citation omitted).

the defendants under section 10(b) of the Securities Exchange Act of 1934. In fact, the very availability of that avenue of relief has persuaded some courts not to imply a private right of action under section 17(a).[11]

There simply is no indication, explicit or implicit, of legislative intent to create a private right of action under section 17(a). Congressional activity concerning the Securities Act's civil remedies is limited to discussions of sections 11 and 12.[12] There is no explicit evidence of an intent to extend civil remedies under section 17(a).[13] What implicit evidence there is cautions against implying any action under section 17(a). The House Committee Report, in a section entitled "Civil Liabilities," indicates that sections 11 and 12 were intended to be the exclusive

---

[11] *See, e.g., Wachovia Bank & Trust Co., N.A. v. National Student Marketing Corp.*, 650 F.2d 342, 350 n.19 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) (avoiding issue of private right of action under section 17(a) because plaintiffs' "claims can be fully satisfied" under section 10(b); recognizing conflict in circuits on whether section 17(a) permits private actions). "Under Section 17(a) of the Securities Act, it has generally been possible to avoid the implied remedy issue, since, in any event, an implied remedy could be based on Rule 10b-5, making the Section 17(a) remedy redundant." H. Bloomenthal, *1982 Securities Law Handbook* ch. 12 (Implied Remedies — Primarily Rule 10b-5), at 198 (1982) (citing *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 3d, U.S. 913 (1970); *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir.1951)). *Cf. Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 25 (1977) ("where congressional purposes are likely to be undermined absent private enforcement, private remedies may be implied in favor of the particular class intended to be protected by the statute").

[12] *See* H.R. Rep. No. 85, 73d Cong., 1st Sess. 9 (1933) ("Sections 11 and 12 *create and define* the civil liabilities imposed by the Act and the machinery for their enforcement . . . .") (emphasis added).

[13] *See* note 12 *supra; see also Landry*, 688 F.2d at 389-90 & n.34; *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969).

private remedies under the Act and that imposition of a "greater responsibility" than that provided by section 11 and 12 "would unnecessarily restrain the conscientious administration of honest business with no compensating advantage to the public." H.R. Rep. No. 85, 73d Cong., 1st Sess. 10 (1933).[14] The evidence from the Senate is to the same effect. *See* S. Rep. No. 47, 73rd Cong., 1st Sess. 6 (1933); 78 Cong. Rec. 8711-13 (1934).

Implying a private right of action under section 17(a) is also inconsistent with the statutory scheme of the Securities Act. The presence of express civil remedies within the same act militates against a finding of Congressional intent to imply further remedies. *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981); *Transamerica*, 444 U.S. at 19-21; *Touche Ross*, 442 U.S. at 571-74.[15] While there were problems with implying a private right of action under Rule 10b-5, doing so under section 17(a) is even more problematic —"the anomalies are multiplied, since the recognition of such a private right of action involves assuming, not that Congress 'casually nullified' in 1934 what it did in 1933, but that Congress 'casually nullified' in a later section what it did in the very same Act." R. Jennings & H. Marsh, *Securities Regulation* 817 (5th ed. 1982).

[5] As Professor Loss has stated, implying a private action under section 17(a) attributes to Congress the rather bizarre intention of enabling a purchaser to avoid the statute of limitation and other procedural limitations

---

[14] *See* H.R. Rep. No. 85, 73d Cong., 1st Sess. at 21-24; *Texas Gulf Sulphur*, 401 F.2d at 867 (Friendly, J., concurring).

[15] *See Kimmel v. Peterson*, 565 F. Supp. 476, 486 (E.D. Pa. 1983) ("This is especially true here, as section 17(a) is sufficiently broad to cover virtually all activities addressed by sections 11 and 12.").

which it explicitly provided would apply to private actions under sections 11 and 12. 3. L. Loss, *Securities Regulation* 1785-86 (2d ed. 1961).[16] If Congress had intended to provide a private remedy under section 17(a), sections 11 and 12 would be "entirely superfluous" and "[t]he complex scheme which Congress wove in the express civil liability sections would be totally undermined." *Kimmel v. Peterson,* 565 F. Supp. 476, 487 (E.D. Pa. 1983).[17]

The three factors which the Supreme Court has emphasized in applying the *Cort v. Ash* test — the statute's language, its legislative history, and its statutory scheme — all point in precisely the same direction: Congress did not intend in 1933 to create a private right of action under section 17(a). "We are reluctant to tamper with an enforcement scheme crafted with such evident care . . . . 'The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.' " *Russell,* 473 U.S. at 147 (quoting *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. at 97). The Securities Act of 1933 contained such an integrated scheme; unless the plaintiffs can establish that Congress later preserved a judicially-created private remedy under section 17(a),

---

[16] *See* S. Rep. No. 47, 73rd Cong., 1st Sess. 6 (1933) ("A 5-year limitation is placed upon *all* civil suits . . . brought by purchasers.") (emphasis added). This limitation was not applicable to section 17(a). *See* S. 875, 73rd Cong., 2d Sess. §§ 9, 13 (1933).

[17] *See also Landry,* 688 F.2d at 390 ("The creation of an implied cause of action [under section 17(a)] would effectively frustrate the carefully laid framework of the Act."); *Roskos v. Shearson/American Express, Inc.,* 589 F. Supp. 627, 631 (E.D. Wis. 1984) ("To permit a private right of action under § 17(a) would cause the statutory and judicially-crafted restrictions on § 10(b) of the 1934 Act and §§ 11 and 12 of the 1933 Act to atrophy and fall away as securities fraud cases hustled in the back door of § 17.").

any decision to create such a right of action must be left to future congressional action.

Our search for evidence of congressional intent is not limited to the legislative history of the Congress which originally passed the statute in question; nor is our analysis of statutory consistency limited to a review of the statutory scheme at that time. We must also examine Congress' intent when it enacted legislation affecting the statutory scheme of which the section at issue is a part. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353 (1982).

> More precisely, we must examine Congress' perception of the law that it was shaping or reshaping. When Congress enacts new legislation, the question is whether Congress intended to create a private remedy as a supplement to the express enforcement provisions of the statute. When Congress acts in a statutory context in which an implied remedy has already been recognized by the courts, however, the inquiry logically is different. Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the pre-existing remedy.

Id. at 378-79 (footnote omitted).

In holding that Congress intended to preserve an implied private remedy when it amended the Commodity Exchange Act (CEA), the *Curran* Court relied upon the high degree of uniformity in the judicial precedents implying a private right of action at that time. This uniformity of opinion constituted "the contemporary legal context" which the Court found Congress had ratified. *Id.* at 379-82 & nn.62-66.[18]

---

[18]As the Supreme Court stated in *Curran:*

We therefore must examine the contemporary legal context prevailing at the time of any comprehensive reexamination of or significant amendment to the Securities Act of 1933. While we may infer that Congress intended — by its silence — to reaffirm any remedy which existed by overwhelming judicial consensus, we recognize that implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best. *Touche Ross,* 442 U.S. at 571.

> In view of the absence of any dispute about the proposition prior to the decision of *Cort v. Ash* in 1975, it is abundantly clear that an implied cause of action under the CEA was a part of the "contemporary legal context" in which Congress legislated in 1974. In that context, the fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy. A review of the legislative history of the statute persuasively indicates that preservation of the remedy was indeed what Congress actually intended.

Id. at 381-82 (citation and footnote omitted). *See also Herman & MacLean v. Huddleston,* 459 U.S. 375, 380 & n.10 (1983) (because the courts had "consistently recognized for more than 35 years" an implied private right of action under section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, the issue was "simply beyond peradventure"); *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 730 (1975) (Twenty-five years after the first district court held that there was an implied right of action under Rule 10b-5 of the Securities Exchange Act of 1934, the Court "confirmed with virtually no discussion the overwhelming consensus of the District Courts and Courts of Appeals that such a cause of action did exist.") (quoted with approval in *Curran,* 456 U.S. at 380); *Scientex Corp. v. Kay,* 689 F.2d 879, 884 (9th Cir. 1982) ("congressional intent to imply a private right of action may be inferred in a situation where there has been a 'routine and consistent' recognition by the federal courts that such a cause of action exists"; refusing to imply a private remedy under section 16(a) of the Securities Exchange Act of 1934).

[6] No overwhelming consensus ever existed in section 17(a) precedent. The cases which addressed whether a private remedy was available under section 17(a) had not consistently and routinely implied a private remedy at the times when Congress undertook any significant analysis of the Securities Acts. On the contrary, the question had been a subject of much dispute.[19]

As plaintiffs point out, the most significant congressional action occurred in 1975 when "Congress comprehensively revised the securities laws . . . enact[ing] the 'most substantial and significant revision of this country's Federal securities laws since the passage of the Securities Exchange Act in 1934." *Herman & MacLean v. Huddleston,* 459 U.S. 375, 384-85 (1983) (quoting *Securities Acts Amendments of 1975: Hearings on S. 249 before the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs,* 94 Cong., 1st Sess. 1 (1975)) (footnote omitted). Congress, in that revision, was silent as to section 17(a) of the Securities Act.

Our examination of "Congress' preception of the law that it was . . . reshaping," *Curran,* 456 U.S. at 378, con-

---

[19] *See, e.g., Gunter v. Hutcheson,* 433 F.Supp. 42, 44-45 (N.D. Ga. 1977) ("the question is so uncertain" that some courts "have changed or modified their positions in recent years") (compiling cases); *Reid v. Mann,* 381 F.Supp. 525, 527-28 (N.D. Ill. 1974) ("several courts have determined that § 17 was not intended to be used as a basis for private civil remedies [and] . . . [t]hose courts which have accepted the existence of a private right of action, [sic] have generally done so without considering substantively whether the right has any statutory foundation") (compiling cases); *Dyer v. Eastern Trust & Banking Co.,* 336 F.Supp. 890 903-05 (D. Me. 1971) (same); *see also* H. Bloomenthal, *1982 Securities Law Handbook* ch. 12 (Implied Remedies — Primarily Rule 10b-5), at 210 (1982) ("The lower courts are *hopelessly divided* as to whether an implied claim can be based on Section 17(a) of the Securities Act.") (citations omitted; emphasis added).

vinces us that Congress did not intend to "preserve" a private civil remedy as a supplement to the express enforcement provisions of the statute. Plaintiffs contend that the cases refusing to imply a private right of action form an "insignificant minority." This is simply not the case; and, in any event, the state of the law was at least so unclear as to caution against implying a private right of action on the basis of congressional silence.

We note, however, that "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown v. GSA,* 425 U.S. 820, 828 (1976) (footnote omitted), *quoted with approval in Curran,* 456 U.S. at 378 n.61. We have no indication of what Congress' perception of the law was; we can only guess. Congress may have decided to leave the issue for another day, allowing the courts to resolve their conflicting decisions. Because some courts were avoiding the issue by relying on the apparent overlap between section 10(b) and section 71(a),[20] Congress may well have thought that it need not decide whether the statutory scheme of section 17(a) permitted a private right of action. In either case, we cannot say that Congress intended by its silence to

---

[20] *See, e.g., Globus,* 418 F.2d at 1283 (citing *SEC v. Texas Gulf Sulphur Co.,* 401 F.2d 833, 867 (2d Cir. 1968), *cert. denied,* 394 U.S. 976 (1969). *Reid,* 381 F. Supp. at 528 ("[N]either the litigants nor the court have been able to discover a single case in which a private right of action under § 17(a) was permitted where the plaintiff did not also allege a 10b-5 claim for the same conduct.").

preserve a private remedy since the state of the case law in 1975 was insufficiently uniform.[21]

IV.

[7] For all of the foregoing reasons, we affirm the district court's judgment and overrule our prior cases which conflict with this disposition. Because we decide that no private right of action lies under section 17(a), we need not and do not address whether such an action would lie against a municipality.[22] Because we reverse our prior rulings on this certified appeal, the parties will each bear their own costs of appeal. *See* Fed. R. App. P. 39(a).

AFFIRMED.

---

[21]The only indication to Congress from the Supreme Court is contained in its footnote in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733-34 n.6 (1975), in which the Court expressed "no opinion" as to whether an implied right of action exists under section 17(a) and cited cases from the circuit courts which were in conflict.

[22]*Cf. In re New York City Municipal Securities Litigation*, 507 F. Supp. 169, 187-88 (S.D.N.Y. 1980) (no private right of action against municipality).

TANG, Circuit Judge, dissenting:

For thirty-eight years, the implied right of action under § 17(a) has helped protect the investing public from securities fraud and misrepresentation.[1] It has come under increasing attack recently, and today it suffers a mortal blow. The majority persuasively presents the case for reversing the law of this circuit. Other courts have questioned the § 17(a) implied remedy because they sense a Supreme Court trend towards restricting the standards for implying private remedies. Because the majority's decision is neither mandated by precedent nor consonant with the fundamental purposes of securities law, I respectfully dissent.

The implied right of action under § 17(a) comports with the mandate of recent Supreme Court cases. The Court set forth a four-part test for measuring the permissibility of implying a private right of action in *Cort v. Ash*, 422 U.S. 66 (1975). Section 17(a) clearly satisfies the first requirement. Bondholders and other members of the investing public are members " 'of the class for whose *especial* benefit the statute was enacted.' " *Cort v. Ash*, 422 U.S. at 78 (quoting *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)).

> The purpose of the bill is to protect the investing public and honest business. The basic policy is that of informing the investor of the facts concerning securities to be offered for sale in interstate and foreign commerce and providing protection against fraud and misrepresentation.

S.Rep. No. 47, 73d Cong., 1st Sess. 1 (1933); 77 Cong. Rec. 2983 (May 8, 1933) (remarks of Sen. Fletcher).

---

[1]The private right of action was first recognized in *Osborne v. Mallory*, 86 F. Supp. 869 (S.D.N.Y. 1949).

The second factor, evidence of legislative intent "either to create such a remedy or deny one," *Cort v. Ash*, 422 U.S. at 78, also weighs in favor of retaining the implied private remedy. The legislative history of the 1933 Act makes no mention whatsoever of civil liabilities under § 17(a).[2] However, it is significant that when Congress comprehensively amended federal securities laws in 1975, it left § 17(a) unchanged.

> When Congress acts in a statutory context in which an implied remedy has already been recognized by

---

[2]The Civil Liabilities section of the House Committee Report neither explicitly nor implicitly says that Congress intended §§ 11 & 12 to be the exclusive private remedies under the Act. The legislative history quoted in the majority opinion cautioning against the "imposition of 'greater responsibility' " is taken out of context and inapposite. The paragraph discusses the burden shifting requirements of §§ 11 & 12:

> The provisions throwing upon the defendant in suits under sections 11 and 12 the burden of proof to exempt himself are indispensable to make the buyer's remedies under these sections practically effective. Every lawyer knows that with all the facts in the control of the defendant it is practically impossible for a buyer to prove a state of knowledge or a failure to exercise due care on the part of the defendant. Unless responsibility is to involve merely paper liability it is necessary to throw the burden of disproving responsibility for reprehensible acts of omission or commission on those who purport to issue statements for the public's reliance. The responsibility imposed is no more nor less than that of a trust. It is a responsibility that no honest banker and no honest business man should seek to avoid or fear. To impose a lesser responsibility would nullify the purposes of this legislation. To impose a greater responsibility, apart from constitutional doubts, would unnecessarily restrain the conscientious administration of honest business with no compensating advantage to the public.

H.R. Rep. No. 85, 73d Cong. 1st Sess. 9 (1933). Unlike §§ 11 & 12, § 17 does not shift the burden of proof. In this respect, it imposes a lesser standard of responsibility.

> the courts . . . . the question is whether Congress intended to preserve the pre-existing remedy.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378-79 (1982). In 1975 the Seventh[3] and Fourth[4] Circuits and district courts in the Second, Third, Fourth, Fifth and Ninth Circuits[5] recognized a private § 17(a) remedy.[6] The fact that Congress left the statute unchanged evidences an intent to preserve the remedy.

The third *Cort v. Ash* factor, consistency with the "underlying purposes of the legislative scheme," also favors the implied remedy. The underlying purpose of federal securities laws is to encourage private enforcement.

> [W]e repeatedly have emphasized that implied private actions provide "a most effective weapon in the enforcement" of the securities laws and are "a necessary supplement to Commission action."

---

[3]*Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287, 1293 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

[4]*Johns Hopkins University v. Hutton*, 488 F.2d 912 (4th Cir. 1973), *cert. denied*, 416 U.S. 916 (1974).

[5]*See, e.g., Dack v. Shanman*, 227 F. Supp. 26, 28-29 (S.D.N.Y. 1964); *Pfeffer v. Cressaty*, 223 F. Supp. 756, 757 (S.D.N.Y. 1963); *Thiele v. Shields*, 131 F. Supp. 416, 419 (S.D.N.Y. 1955); *Wulc v. Gulf & Western Ind.*, 400 F. Supp. 99 (E.D. Pa 1975); *Crowell v. Pittsburgh and Lake Erie R. Co.*, 373 F. Supp. 1303, 1310-11 (E.D. 1974); *Dorfman v. First Boston Corp.*, 336 F. Supp. 1089, 1093-96 (E.D. Pa. 1972); *Corey v. Bache & Co.*, 355 F. Supp. 1123 (S.D. W. Va. 1973) (by implication); *Larson v. Tony's Investments, Inc.*, 46 F.R.D. 612 (M.D. Ala. 1969) (by implication); *Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417, 422 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970).

[6]As the majority opinion notes, there was a minority view. *Curran* does not require an "overwhelming majority" for us to give weight to Congressional inaction.

Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak,* 377 U.S. 426, 432 (1964)).

I disagree that the § 17(a) private remedy makes §§ 11 & 12 "entirely superfluous." The latter sections carry an inference of liability and shift the burden of proof to the defendant. Under § 17(a) the burden of proof remains on the plaintiff. Furthermore, "[t]he fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section." *Cannon v. University of Chicago,* 441 U.S. 677, 711 (1979); *but cf. Touche Ross & Co. v. Redington,* 442 U.S. 560, 571 (1979); (presence of explicit provisions will provide "further justification" for refusing to imply a remedy). The Seventy-Third Congress adopted both the 1933 and 1934 Acts. The Acts contain overlap and duplication which courts have tolerated.[7] In the overall statutory scheme, the overlap between a private remedy under § 17(a) and §§ 11 and 12 is hardly unusual or significant. It is significant, however, that § 10(b) and Rule 10b-5 contain almost identical language to § 17(a). That there is a private right of action under § 10(b) and Rule 10b-5 is "simply beyond peradventure." *Herman & Maclean v. Huddleston,* 459 U.S. 375, 380 (1983).

---

[7]Much of the information required to be filed by § 12 of the 1934 Act was already required by §§ 6 & 7 of the 1933 Act. Both § 10 of the 1934 Act and §17 of the 1933 Act prohibit fraudulent conduct. "While some conduct actionable under § 11 may also be actionable under § 10(b), it is hardly a novel proposition that the 1934 Act and the 1933 Act 'prohibit some of the same conduct.' " *Herman & MacLean v. Huddleston,* 459 U.S. 375, 383 (1983) (quoting *United States v. Naftalin,* 441 U.S. 768, 778 (1979).

> the courts . . . . the question is whether Congress intended to preserve the pre-existing remedy.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378-79 (1982). In 1975 the Seventh[3] and Fourth[4] Circuits and district courts in the Second, Third, Fourth, Fifth and Ninth Circuits[5] recognized a private § 17(a) remedy.[6] The fact that Congress left the statute unchanged evidences an intent to preserve the remedy.

The third *Cort v. Ash* factor, consistency with the "underlying purposes of the legislative scheme," also favors the implied remedy. The underlying purpose of federal securities laws is to encourage private enforcement.

> [W]e repeatedly have emphasized that implied private actions provide "a most effective weapon in the enforcement" of the securities laws and are "a necessary supplement to Commission action."

---

[3]*Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287, 1293 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

[4]*Johns Hopkins University v. Hutton*, 488 F.2d 912 (4th Cir. 1973), *cert. denied*, 416 U.S. 916 (1974).

[5]*See, e.g., Dack v. Shanman*, 227 F. Supp. 26, 28-29 (S.D.N.Y. 1964); *Pfeffer v. Cressaty*, 223 F. Supp. 756, 757 (S.D.N.Y. 1963); *Thiele v. Shields*, 131 F. Supp. 416, 419 (S.D.N.Y. 1955); *Wulc v. Gulf & Western Ind.*, 400 F. Supp. 99 (E.D. Pa 1975); *Crowell v. Pittsburgh and Lake Erie R. Co.*, 373 F. Supp. 1303, 1310-11 (E.D. 1974); *Dorfman v. First Boston Corp.*, 336 F. Supp. 1089, 1093-96 (E.D. Pa. 1972); *Corey v. Bache & Co.*, 355 F. Supp. 1123 (S.D. W. Va. 1973) (by implication); *Larson v. Tony's Investments, Inc.*, 46 F.R.D. 612 (M.D. Ala. 1969) (by implication); *Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417, 422 (N.D. Cal. 1968), *modified*, 430 F.2d 1202 (9th Cir. 1970).

[6]As the majority opinion notes, there was a minority view. *Curran* does not require an "overwhelming majority" for us to give weight to Congressional inaction.

Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak,* 377 U.S. 426, 432 (1964)).

I disagree that the § 17(a) private remedy makes §§ 11 & 12 "entirely superfluous." The latter sections carry an inference of liability and shift the burden of proof to the defendant. Under § 17(a) the burden of proof remains on the plaintiff. Furthermore, "[t]he fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section." *Cannon v. University of Chicago,* 441 U.S. 677, 711 (1979); *but cf. Touche Ross & Co. v. Redington,* 442 U.S. 560, 571 (1979); (presence of explicit provisions will provide "further justification" for refusing to imply a remedy). The Seventy-Third Congress adopted both the 1933 and 1934 Acts. The Acts contain overlap and duplication which courts have tolerated.[7] In the overall statutory scheme, the overlap between a private remedy under § 17(a) and §§ 11 and 12 is hardly unusual or significant. It is significant, however, that § 10(b) and Rule 10b-5 contain almost identical language to § 17(a). That there is a private right of action under § 10(b) and Rule 10b-5 is "simply beyond peradventure." *Herman & Maclean v. Huddleston,* 459 U.S. 375, 380 (1983).

---

[7]Much of the information required to be filed by § 12 of the 1934 Act was already required by §§ 6 & 7 of the 1933 Act. Both § 10 of the 1934 Act and §17 of the 1933 Act prohibit fraudulent conduct. "While some conduct actionable under § 11 may also be actionable under § 10(b), it is hardly a novel proposition that the 1934 Act and the 1933 Act 'prohibit some of the same conduct.' " *Herman & MacLean v. Huddleston,* 459 U.S. 375, 383 (1983) (quoting *United States v. Naftalin,* 441 U.S. 768, 778 (1979).

The majority argues that when this court implied a remedy in § 17(a) by reason of its similarity to § 10(b)[8] it was "embarking on a course fraught with danger" because scienter may not be an element of a private action under § 17(a) (2)&(3). *See Aaron v. SEC*, 446 U.S. 680 (1980). When purchasing securities, the investing public entrusts its hard-earned money to corporate officials. Investors usually lack a sophisticated understanding of investment products and must rely on the assurances and expertise of these officials. Congress reasonably could have chosen to hold securities sellers to a fiduciary standard of care. That these officials might be held to a mere negligence standard in a private action under § 17(a) (2)&(3) causes me little concern. Nevertheless, if the evil is the negligence standard then we should adjust the standard of care, not eliminate the remedy.

The final *Cort v. Ash* requirement is whether the implied remedy is "traditionally relegated to state law . . . . " *Cort v. Ash*, 422 U.S. at 78. Regulation of misconduct in the securities field is not a peculiar concern of the states. *Cf. Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 35 (1979).

The Ninth Circuit has definitively held that a private cause of action exists under § 17(a). *Mosher v. Kane*, 784 F.2d 1385, 1391-92 n.9 (9th Cir. 1986); *Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808 815 (9th Cir. 1981). I agree with the court in *Mosher* that recognizing an implied right of action is "the better view." 784 F.2d at 1391-92 n.9. *Stephenson* and *Mosher* are

> consistent with Congress' intent, repeatedly recognized by the Court, that securities legislation enacted for the purpose of avoiding frauds be construed "not

---

[8] *Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 815 (9th Cir. 1981).

> technically and restrictively, but flexibly to effectuate its remedial purposes."

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 217 (1976) (Blackmun, J., dissenting); *see also Huddleston,* 459 U.S. at 386-87; *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 151 (1972); *Superintendent of Ins. v. Bankers Life & Casualty Co.,* 404 U.S. 6, 12 (1971).

The Supreme Court has expressly reserved this issue four times in the last twelve years.[9] That the Court has failed to resolve it, manifests that the question is much closer than the majority makes it seem. The Court recently reaffirmed the private right of action under § 10(b) and Rule 10b-5. *Huddleston,* 459 U.S. 375. We are prematurely, and perhaps even incorrectly, anticipating the ruling of the Court.

Today's decision invokes in me the reaction expressed by Justice Blackmun in his dissent in *Blue Chips Stamps,* the decision that restricted § 10(b) and Rule 10b-5 actions to actual purchasers and sellers of securities:

> In doing so, the Court exhibits a preternatural solicitousness for corporate well-being and a seeming callousness toward the investing public quite out of keeping, it seems to me, with our own traditions and the intent of the securities laws.

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting).

Perhaps, as commentators suggest, the trend is toward restricting the anti-fraud protections in federal securities

---

[9] *Bateman Eichler,* 472 U.S. at 304 n. 9; *Huddleston,* 459 U.S. at 378 n.2; *International Bhd. of Teamsters v. Daniel,* 439 U.S. 551, 557 n.9 (1979); *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 733-34 n.6 (1975).

law.[10] Today, the 9th Circuit rushes to the forefront. The majority opinion brings an end to the §17(a) implied private remedy in this circuit. I prefer to adhere to stare decisis and pay my respects to a worthy doctrine at this hour of its premature demise.

---

[10]*See, e.g.*, Steinberg, *Section 17(a) of the Securities Act of 1933 After* Naftalin *and* Redington, 68 Geo. L. Rev. 163, 163-65 (1979).

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No. CA 000972

CLASS ACTION
(Class Action and Shareholder Derivative Action)

A. JACQUES LOU,
Plaintiff,

vs.

WILLIAM BELZBERG, HYMAN BELZBERG, SAMUEL BELZBERG, FIRST CITY FINANCIAL CORPORATION LTD., FIRST CITY TRUST COMPANY, ROXBORO INVESTMENTS (1976) LTD., BEL-FRAN INVESTMENTS LTD., BELL-CAL HOLDINGS LTD., BEL-ALTA HOLDINGS LTD., DREXEL BURNHAM LAMBERT INCORPORATED, JOHN R. HALL, ROBERT T. MCCOWAN, WILLIAM R. SEATON, CHARLES J. LUELLEN, SAMUEL C. BUTLER, EUGENE W. ERIKSON, JAMES B. FARLEY, ROBERT D. GORDON, WALTER W. HILLENMEYER, JR., DON T. MCKONE, HAROLD S. MOHLER, GROVER E. MURRAY, JANE C. PFEIFFER, ROBERT S. REIGELUTH, JAMES R. RINEHART, F. H. ROSS, JR., ROBERT B. STOBAUGH, RICHARD L. TERRELL, and JAMES W. VANDEREER,

Defendants,

ASHLAND OIL, INC.,

Nominal Defendant.

FIRST AMENDED VERIFIED CLASS ACTION AND SHAREHOLDER'S DERIVATIVE COMPLAINT FOR BREACH OF FIDUCIARY DUTY, ABUSE OF CONTROL, WASTE OF CORPORATE ASSETS, UNJUST ENRICHMENT, UNFAIR TRADE PRACTICES, FRAUD AND DECEIT, AND

VIOLATIONS OF THE SECURITIES ACT OF 1933 AND THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

Plaintiff Demands a Trial By Jury

WILLIAM S. LERACH
EUGENE MIKOLAJCZYK
MILBERG WEISS BERSHAD
SPECTHRIE & LERACH
2000 Central Savings Tower
225 Broadway
San Diego, California 92101
Telephone: (619) 321-1058

DAVID B. GOLD
DAVID B. GOLD, A PROFESSIONAL
LAW CORPORATION
120 Montgomery Street
Suite 650
San Francisco, California 94104
Telephone: (415) 981-2440
Attorneys for Plaintiff

Plaintiff through this First Amended Verified Complaint alleges on information and belief, except for the allegations in paragraph 6 which are based upon personal knowledge, as follows:

I.

NATURE OF ACTION

1. This is a shareholder's derivative action on behalf of Ashland Oil, Inc. ("Ashland") and a class action on behalf of all persons, except defendants, who owned shares of the common stock of Ashland on April 1, 1986, the day Ashland revealed that it had repurchased all the Ashland stock owned by entities controlled by the

Belzberg family at a large profit to them and to the detriment of Ashland and the remaining shareholders, as part of an overall arrangement designed to reduce the public loan of Ashland shares, place a controlling block of Ashland stock in an entity controlled by and loyal to the Ashland Board and perpetuate the directors in their positions of power, prestige and profit as Ashland directors and officers. The defendants are members of the Belzberg family and certain entities controlled and/or utilized by them to pursue the wrongs complained of herein, Drexel Burnham Lambert Incorporated ("Drexel Burnham") which assisted the Belzberg defendants, and the Ashland Directors.

2. During the period February 11, 1986, through March 25, 1986, the Belzbergs accumulated 1.4 million shares of Ashland common stock at prices ranging from $38½ to $45 per share, and options to purchase an additional 1.2 million shares, and on March 26, 1986 announced an intent to make a cash tender offer of "at least $60.00 per share" for the balance of Ashland's outstanding common stock. The Belzbergs intended to take advantage of the Ashland Board's scheme to prevent any acquisition of Ashland by extracting as high a price as possible for their shares from Ashland, in return for an agreement to sell their Ashland shares to the company and refrain from further purchases for several years. On April 1, 1986, aided by defendant Drexel Burnham, the Belzbergs used their power to influence Ashland's corporate behavior to cause Ashland's directors to purchase the 2.6 million Ashland shares owned or controlled by the Belzbergs for $51.00 per share, or $133 million, thus providing a $15.6 million profit for the Belzbergs in just over 60 days. The Belzberg defendants and the Ashland Board further agreed to cause Ashland to offer to purchase 7.5 million shares of Ashland stock on the open

market while selling 5.3 million shares to an Ashland ESOP controlled by the Ashland Board, thus eliminating any possibility of an outside takeover of Ashland and further securing the Ashland directors' control and dominance of Ashland and their Board/Officers' positions. The agreement had no valid or justifiable business purpose and was consummated only to further the interests of the Ashland directors and the Belzbergs. After the repurchase, Ashland's stock fell in price below that paid to the Belzbergs and Ashland's credit standing was placed on the Credit Watch list with "negative implications" by the leading national credit rating agencies.

3. During the past 10 years, the Belzbergs, using their related and family controlled entities, including First City Financial Corporation Ltd. and Far West Financial Corporation, have undertaken several other raids on American public companies for the purpose of extracting for themselves huge profits in the form of large payments for controlling blocks of stock they had acquired by threatening to pursue hostile tender offers — a practice euphemistically termed as "greenmail," but which is actually a species of commercial extortion or blackmail, an unlawful business practice, and breach of duty by a shareholder in a position to influence corporate action, of which the "greenmailing" of Ashland is only the most recent example.

4. The members of the Class have been damaged by purchasing or holding Ashland stock at prices inflated by the manipulations and wrongful conduct of the defendants, and which have now decreased in price, and by the diversion of an unfairly disproportionate share of corporate assets to the Belzbergs, all to serve the private and selfish interests of Ashland's directors and Ashland's largest and controlling shareholder, *i.e.*, the Belzberg

family and its corporate enterprises. Ashland has also been damaged by the wasting of its corporate assets and the harming of its financial condition by the spending of approximately $133 million of its corporate assets to pay off the Belzbergs and a much larger sum — some $350 million to repurchase another 7.5 million shares from public hands — all to prevent the consummation of any takeover which would oust the incumbent Board from its control of Ashland. The defendants have followed and are following a concerted course of conduct, and have aided and abetted each other and the Ashland directors in the commission of practices and conduct violative of their respective statutory and fiduciary duties to Ashland and its shareholders and have thereby been unjustly enriched, which harmed both Ashland and its other shareholders. Included in such unfair, deceptive and unlawful acts are the Belzbergs' pattern and practice of "greenmail" committed against several American public companies, including misrepresentations, omissions and other deceptive practices pursued by the Belzbergs that were intended to and did, in this instance, inflate the price at which Ashland common stock was traded, so that the Belzberg interests could sell out at large profits. Plaintiff seeks redress for these wrongs under applicable theories of intentional or negligent breach of fiduciary duty, abuse of control, waste of corporate assets, unjust enrichment, unfair trade practices, fraud and deceit, and violations of the Securities Act of 1933 and the Racketeer Influenced and Corrupt Organizations Act and seeks provisional or injunctive relief on behalf of Ashland and the Class of shareholders sued for as specified herein.

II.

JURISDICTION AND VENUE

5. The injuries and damages complained of herein occurred, in part, in Los Angeles County, California, in that, *inter alia*, defendants knew or could reasonably have expected that the impact of their wrongful conduct would be felt by Ashland shareholders residing there. Ashland is registered to conduct business in California, has operating subsidiaries in California and has a designated agent to receive service of process in Los Angeles, California. Each of the Belzberg brothers has been personally present in California on business in recent years in carrying out the extensive financial activities that they pursue as a group — as co-venturers and co-participants. The Belzberg brothers are also generous backers of charitable projects located in Los Angeles which they have all personally visited. The Belzberg brothers and First City Financial Corporation, Ltd., a corporation they control, also regularly conduct business in California, in part, through defendant William Belzberg who is a resident of Beverly Hills, California, through Far West Financial Corporation, a California corporation controlled by the Belzbergs which maintains its principal office in Newport Beach, California and has operations in Los Angeles County, and through First City Properties of Beverly Hills which owns and operates real estate in California. First City Financial also does business in California directly, via its Angeles and First City Industries subsidiaries which are located in California and which engage in both the oil, gas and the real estate syndication and real estate development businesses. Defendant Drexel Burnham also conducts business in Los Angeles and its Los Angeles office was involved in the wrongdoing complained of herein. The amount in controversy is in excess of the

jurisdictional minimum of the Court, and certain aspects of this action are of an equitable nature and thereby subject to the jurisdiction of the Court.

III.

PARTIES

6. Plaintiff A. Jacques Lou ("Lou") maintains a residence in Los Angeles, California and owned 1,000 shares of Ashland common stock on and prior to April 1, 1986. Plaintiff Lou was a shareholder of Ashland at the time the transactions complained of herein took place and at the time plaintiff's complaint was filed. Plaintiff Lou continues to hold 500 shares of Ashland common stock.

7. Ashland is named as a nominal defendant in the derivative action in counts one through nine herein. Ashland is a corporation organized and existing under the laws of the Commonwealth of Kentucky. Ashland is a diversified petroleum refiner, marketer of petroleum products, chemical products, coal, construction products, engages in petroleum production, provides engineering services to the energy and other industries, and designs and manufactures industrial steam generating equipment and utility boilers. Ashland engages in the production of crude oil and natural gas in the United States and in other parts of the world. As of September 30, 1985, Ashland had approximately 28 million shares of common stock outstanding and in excess of 39,000 shareholders of record.

8. The following defendants are referrred to collectively as the "Director Defendants" and are sued as defendants and as aiders and abettors and co-conspirators who caused Ashland to use its corporate assets to buy off the Belzbergs so that they could continue to

control Ashland and maintain their respective positions of power, prestige and profit with Ashland:

(a) John R. Hall is, and at all relevant times was, Chairman of the Board of Directors, Chief Executive Officer, and a member of the Finance Committee of Ashland;

(b) Robert T. McCowan is, and at all relevant times was, the Vice Chairman of the Board of Directors; Executive Vice President; a director; and a member of its Benefit Plans, and Manufacturing & Transportation Committees of Ashland;

(c) William R. Seaton is, and at all relevant times was, Vice Chairman of the Board of Directors, Chief Financial Officer, a director, and a member of the Finance Committee of Ashland;

(d) Charles J. Luellen is, and at all relevant times was, Senior Vice President; Group Operating Officer; a director; and a member of the Benefit Plans, Finance, and Manufacturing & Transportation Committees of Ashland;

(e) Samuel C. Butler is, and at all relevant times was, a director and member of the Finance Committee of Ashland;

(f) Eugene W. Erikson is, and at all relevant times was, a director and member of the Finance, Manufacturing & Transportation, and Nominating Committees of Ashland;

(g) James B. Farley is, and at all relevant times was, a partner and member of the Audit, and Personnel & Compensation Committees of Ashland;

(h) Robert D. Gordon is, and at all relevant times was, a director and member of the Benefit Plans, Energy, and Nominating Committees of Ashland;

(i) Walter W. Hillenmeyer, Jr. is, and at all relevant times was, a director and member of the Audit, Benefit Plan, Finance, and Nominating Committees of Ashland;

(j) Don T. McKone is, and at all relevant times was, a director and member of the Benefit Plans Committee of Ashland;

(k) Harold S. Mohler is, and at all relevant times was, a director and member of the Audit, Benefit Plans, Manufacturing & Transportation, and Personnel & Compensation Committees of Ashland;

(l) Grover E. Murray is, and at all relevant times was, a director and member of the Audit, Energy, and Manufacturing & Transportation Committees of Ashland;

(m) Jane C. Pfeiffer is, and at all relevant times was, a director and member of the Finance, and Personnel & Compensation Committees of Ashland;

(n) Robert S. Reigeluth is, and at all relevant times was, a director and member of the Finance, Manufacturing & Transportation, and Nominating Committees of Ashland;

(o) James R. Rinehart is, and at all relevant times was, a director and member of the Audit, Finance, and Manufacturing & Transportation Committees of Ashland;

(p) F. H. Ross, Jr. is, and at all relevant times was, a director of Ashland;

(q) Robert B. Stobaugh is, and at all relevant times was, a director and member of the Energy, Finance, Manufacturing & Transportation, and Personnel & Compensation Committees of Ashland;

(r) Richard L. Terrell is, and at all relevant times was, a director and member of the Benefit Plans, and Personnel & Compensation Committees of Ashland; and

(s) James W. Vandereer is, and at all relevant times was, a director and member of the Audit, and Energy Committees of Ashland.

9. With respect to all matters complained of herein, the Director Defendants have acted in a unified and unitary fashion, unanimously approved the "greenmail" payment to the Belzbergs and none of them has dissented, publicly or privately, from the action taken. Spokesmen for the Director Defendants have repeatedly stated that the action taken with respect to the Belzbergs was proper, justified, and not the result of any improper motive or purpose.

10. The Director Defendants perpetrated, approved, aided and abetted, or conspired in the commission of the wrongs complained of herein, and as a Board unanimously ratified the buy-off of the Belzbergs.

11. By reason of their positions as directors of Ashland and their control of the business and corporate affairs of Ashland, the Director Defendants owed Ashland and its shareholders fiduciary obligations and were and are required to use their ability to control and manage Ashland in a fair, just and equitable manner; to act in furtherance of the best interests of Ashland and its shareholders; to refrain from abusing their positions of control and not to favor their own interests or the interests of any particular shareholders at the expense of Ashland and its shareholders.

12. The following defendants are referred to herein as the "Belzberg Group":

(a) Defendant William Belzberg is a citizen of the United States, a resident of Beverly Hills, California, a brother of Samuel and Hyman Belzberg, and was at all relevant times a member of and Chairman of the Board of Directors of First City Financial Corporation, Ltd. ("First City") and its Chief Executive Officer; Chairman of the Board of Directors of Far West Financial Corporation of Newport Beach, California; and Chairman of the Board of Directors, President and Chief Executive Officer of First City Properties, Inc. located in Beverly Hills, California;

(b) Defendant Hyman Belzberg, is a resident of Canada and a brother of William and Samuel Belzberg;

(c) Defendant Samuel Belzberg is a resident of Canada and a brother of William and Hyman Belzberg; the Belzberg brothers while pursing this conduct complained of herein have acted in a cooperative and unified fashion, using one or more of the various business entities they control as the instrumentalities to achieve their ends;

(d) Defendant First City is a Canadian corporation with its principal office in Vancouver, British Columbia. First City is a holding investment corporation with financial, manufacturing and real estate subsidiaries throughout Canada and the United States. Among the entities controlled by First City, is Far West Financial Corporation a large savings and loan located in Newport Beach, California. Collectively, William Belzberg, Hyman Belzberg and Samuel Belzberg control approximately sixty-eight percent (68%) of the outstanding shares of First City and through First City control Far West Financial Corporation and First City Properties and Industries. The Belzbergs also own a controlling interest in Far West Financial. Defendants First City Financial Corporation, First City Trust Company, Roxboro Invest-

ments (1976) Ltd., Bel-Fran Investments Ltd., Bel-Cal Holdings Ltd., and Bel-Alta Holdings Ltd. are controlled by corporations or family trusts under the control of William Belzberg, Hyman Belzberg and Samuel Belzberg, and the Belzbergs have dominated, influenced and controlled these defendants, and there has been such a unity of interest, ownership and control between these defendants and the Belzbergs such that the individuality and separateness of these organizations have ceased. The Belzbergs have utilized First City as their instrumentality for perpetrating the greenmail and other wrongs detailed herein. First City is a highly leveraged corporation with most of its assets located outside of the United States. The Belzbergs utilized First City to attempt to operate beyond the jurisdiction of the American courts and to avoid legal process and redress by victimized corporations and shareholders by the fiction of their Canadian corporation and family trusts. Adherence to the fiction of First City's and the Belzberg Group's separate existences would, under the circumstances, sanction a fraud and promote injustice;

(e) Defendant First City Trust Company is a Canadian company and ninety-eight percent of its outstanding common stock is owned by First City. First City Trust owns and controls some 61,000 of the Ashland shares owned by the Belzbergs; and

(f) Defendants Roxboro Investments (1976) Ltd., Bel-Fran Investments Ltd., Bel-Cal Holdings Ltd., and Bel-Alta Holdings Ltd. are corporations controlled by the Belzbergs and through which the Belzberg Group controls First City Financial Corporation Ltd. and First City Trust Company. Roxboro Investments (1976) Ltd., Bel-Fran Investments Ltd., Bel-Cal Holdings Ltd., and Bel-

Alta Holdings Ltd. were signatories to the buy out agreement complained of herein.

13. Defendant Drexel Burnham, a Delaware corporation, is a firm of investment bankers with its principal office in Los Angeles, California. Drexel Burnham through its Los Angeles office acted as financial advisor to the Belzberg Group in pursuing the course of conduct complained of herein and actively helped the Belzberg Group plan and execute the wrongful transactions complained of herein. Drexel Burnham was also instrumental in aiding and abetting other "greenmail" activities by the Belzberg Group discussed *infra* and has assisted other corporate raiders in greenmailing a number of companies, including the infamous Steinberg raid on Walt Disney Productions, which produced a huge greenmail payoff to Steinberg from Disney. Drexel Burnham received substantial fees in payment for its services and also received part of the illegal payments complained of herein.

14. Over the past several years the Belzberg Group, through First City and Far West, which they control, have engaged in a pattern of illegal conduct, including repeated breaches of fiduciary duty, involving deception and manipulation of the public markets in common stocks of several American companies by acquiring a substantial and/or controlling interest in a corporation and then threatening to mount or mounting a tender offer or issuing a public announcement declaring an intent to acquire the company through merger or purchase of all or a majority of its outstanding stock, to create pressure on management of the target company to force a buy out of the Belzberg Group's interest at a premium and profit for the Belzberg Group, regardless of the impact on the company or its other shareholders. Among the companies against which the Belzberg Group has used these "green-

mail" tactics to the detriment of the corporations and their other public shareholders are: Masonite Corporation; Blue Bell, Inc.; U. S. Industries; Hartmarx Corporation; Arvin Industries; and Potlatch, Inc.

15. Almost identical incidents of greenmail have been pursued by the Belzberg Group on prior occasions. In June, 1984, First City disclosed that it had acquired 9.2% of Blue Bell, Inc., and further announced that it had filed a request with the Department of Justice and the Federal Trade Commission for an opinion that its anticipated offer to purchase 49% of Blue Bell's stock would not violate the anti-trust laws. Shortly thereafter, after completing its intimidation of the Blue Bell's management and directors, First City cooperated with Blue Bell to arrange for a leveraged buy out by management which relieved First City from acquiring the company and which netted First City a profit in excess of $6 million. In November of 1985, the Belzberg Group "greenmailed" Potlatch Corporation into purchasing its 7% interest in Potlatch stock and options after the Belzberg Group had publicly announced its intent to buy 100% of Potlatch's stock. The cash transaction netted the Belzberg Group a profit of $8 million, but caused a downgrading of Potlatch's commercial paper and redeemable preferred stock. In March, 1986, First City greenmailed Hartmarx Corporation into paying over $24 million for First City's 4.1% interest in the company, an additional $266,400 for options held by First City and $315,000 as an "interest factor."

16. At the time of the wrongs complained of herein, the Belzberg Group, by reason of their ownership, control or beneficial interest in Ashland common stock, were able to dominate and influence the business and corporate affairs of Ashland and thus owed Ashland and its share-

holders fiduciary obligations, and were required to use their ability to influence and control Ashland in a fair, just and equitable manner; to act in furtherance of the best interests of Ashland and all of its shareholders; to refrain from abusing their positions of control and not to favor their own interests at the expense of Ashland and its shareholders.

IV.

CONCERTED ACTION, AGENCY AND DOE ALLEGATIONS

17. At certain times mentioned herein, the Belzberg Group, Drexel Burnham and the Director Defendants have pursued a common course of conduct, acted in concert with and conspired with one another, and have aided and abetted one another to accomplish the wrongs complained of.

18. Except as alleged herein plaintiff is as yet ignorant of the true names and capacities, whether individual, associate, corporate or otherwise, of defendants sued as Does 1 through 500, inclusive, and therefore sue these defendants by such fictitious names. Plaintiff will seek leave of the Court to amend this complaint to allege their true names and capacities when ascertained. Each fictitiously-named defendant aided and abetted or participated with the named defendants in the wrongful acts and course of conduct, otherwise caused the damages and is responsible in some manner for the acts, occurrences and events alleged in this complaint.

V.

DERIVATIVE ACTION ALLEGATIONS

19. Plaintiff brings the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action asserted herein derivatively in the right and for the benefit of Ashland, and plaintiff will fairly and adequately represent and protect the interests of Ashland and its other shareholders.

20. Plaintiff has made no demand on the present directors of Ashland to institute the derivative actions consolidated herewith because any demand was unnecessary and such demand would have been futile and a useless act for at least the following reasons:

(a) All of the directors of Ashland approved the buy out of the Belzberg Group and promised (explicitly or implicitly) not to sue or pursue them legally, and thus are incapable of exercising independent objective judgment in deciding whether to bring this action against the Belzbergs or Brexel Burnham;

(b) All of the directors actively participated in, approved or permitted the wrongs alleged herein including unanimously ratifying management's action in making the buy out, the open market stock repurchases and the placing of stock in the company controlled ESOP, and in their efforts to conceal the adverse impact of those wrongs from Ashland's other shareholders;

(c) The acts complained of herein were illegal and the funds expended by Ashland constituted a waste of Ashland's assets, and thus these acts were incapable of ratification by the Board of Directors or Ashland's shareholders;

(d) All of the then-current directors of Ashland were under the control and domination of the principal beneficiaries of the alleged wrongdoing, and thus were incapable of exercising independent objective judgment in deciding whether to bring this action;

(e) In order to bring these suits, the directors would have had to sue themselves, which they will not do;

(f) All of the directors are interested in the transactions complained of and have benefited personally from those transactions, which transactions were designed to entrench the directors in their positions of power, prestige and profit, to assure the continuance of their lucrative perquisites and remuneration either as directors and/or officers of Ashland and to prevent control of Ashland from passing to independent hands which would result in the disclosure of the truth concerning unlawful payments to officials in Oman and the pursuit of claims based thereon on behalf of Ashland against them. A demand would also have been futile since certain of the directors were seeking to maintain their positions of employment with Ashland and dominated the company, its management and the Board of Directors of Ashland;

(g) The directors of Ashland have publicly endorsed and defended the actions complained of herein and have specifically denied that the buy out of the Belzberg Group was a greenmail payment or in any way improper or illegal and hence have indicated they will not sue the Belzbergs or Drexel Burnham; and

(h) A true and correct copy of the original complaint was delivered to Ashland prior to its filing by Federal Express delivery to its corporate secretary at its corporate headquarters in Russell, Kentucky, and a true and correct copy of this First Amended Verified Complaint

was similarly delivered to Ashland's corporate secretary at its corporate headquarters in Russell, Kentucky.

VI.

CLASS ACTION ALLEGATIONS

21. Plaintiff brings the tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth causes of action asserted herein individually and on behalf of all persons similarly situated. The class which plaintiff seeks to represent is composed of all persons who owned Ashland common stock on April 1, 1986, when Ashland's agreement to buy back the Ashland stock held by the Belzberg Group (the "Buy Back Agreement") was publicly announced. Excluded from the Class are the defendants, the subsidiaries and affiliates of each of the corporate defendants, the members and members of the immediate families of the Belzberg Group and each of the Director Defendants, the legal representatives, heirs, successors or assigns of any of the aforementioned, and any person or entity controlled by any of the aforementioned on April 1, 1986. Plaintiff is a member of the Class.

22. The members of the Class are so numerous that joinder of all members is impracticable. There are approximately 39,000 Ashland common shareholders and over 28 million shares of Ashland common stock outstanding. The disposition of their claims in a class action is of benefit to the parties and the Court. The record owners of Ashland common stock and the members of the proposed Class are easily determined from the stock transfer journals maintained by Ashland or its agents. A significant number of Ashland shareholders live in California, the present number of which can be determined via discovery of documents in the possession of Ashland and its transfer agent or registrar.

23. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. Questions of fact common to the Class include, *inter alia:*

(a) Whether the Director defendants breached their fiduciary duties by taking the anti-takeover steps complained of herein when they caused Ashland to buy back the Belzberg Group's Ashland shares at a price in excess of that at which it had been trading prior to the Belzberg Group's disclosure of their interest and takeover plans and which guaranteed a large profit to the Belzberg Group;

(b) Whether the Director Defendants engaged in a plan and scheme to entrench themselves in their positions of management to maintain their lucrative remuneration and perquisites from Ashland; and whether the Belzberg Group engaged in a preconceived scheme to coerce the payment of an illegal premium for Ashland's common stock held by the Belzberg Group while violating their fiduciary duties to Ashland and its other shareholders;

(c) Whether the Director Defendants are guilty of mismanagement, whether they were negligent, and whether they abused or conspired to abuse their control of Ashland and/or violate their duties to Ashland and its other shareholders, and whether they have engaged in a pattern of racketeering activity;

(d) Whether the Belzberg Group, aided and abetted by Drexel Burnham, engaged in a scheme to coerce an illegal payment for Ashland's common stock held by the Belzberg Group while engaging in deceit and/or violating their fiduciary duties to Ashland and its other shareholders;

(e) Whether the members of the Belzberg Group, aided and abetted by Drexel Burnham, breached their fiduciary duties by using their power, influence and shareholdings to cause a buy-back of the Belzberg Group's Ashland shares on terms discriminately favorable to the Belzberg Group and detrimental to the other Ashland shareholders, as alleged herein;

(f) Whether the Belzberg Group, aided and abetted by Drexel Burnham, breached their fiduciary duties and aided and abetted the Director Defendants in breaching their fiduciary duties to Ashland's shareholders; the propriety, fairness and legality of the transactions attacked in this action; the duties owed by the Belzberg Group to members of the Class thereof; the resulting liabilities of the Belzberg Group and the proper remedy;

(g) Whether the Belzberg Group, aided and abetted by Drexel Burnham, engaged in fraud, deceit or negligent misrepresentation in their publicly declared intent to purchase 100 percent (100%) of Ashland's common stock; and

(h) Whether the Belzberg Group, aided and abetted by Drexel Burnham, has engaged in a pattern of racketeering activity including their greenmail raid on Ashland.

24. Plaintiff's claims are typical of the claims of the members of the Class, and said plaintiff will adequately represent and protect the interests of the Class. Plaintiff has retained counsel who are competent and experienced in derivative and class action litigation and who will provide adequate representation and protect the interests of the Class.

25. The likelihood of individual class members prosecuting separate individual actions is remote due to the relatively small loss suffered by each class member as

compared to the burden and expense of prosecuting litigation of this nature and magnitude. Absent a class action, the defendants are likely to retain the benefits of their wrongdoing and class members are unlikely to recover their losses.

VII.

BACKGROUND

26. During recent years and until 1985, Ashland was plagued by declining earnings, due in substantial part to its divestiture of major portions of its petroleum properties and its concentration in the refining segment of the energy industry. During Ashland's 1983 fiscal year ending September 30, 1983, its net earnings were $2.23 per share, and for fiscal year 1984, it experienced a loss of $7.40 per share. During this time, its book value declined from $39.27 in 1983 per share to $30.20 per share in 1984.

27. In 1985, Ashland experienced a substantial turnabout in its earnings and financial performance. As a consequence of the drop in crude oil prices, Ashland was able to purchase low price crude stock thus increasing the profit margins on its refinery operations. For fiscal year 1985, Ashland reported earnings of $4.12 per share and the book value of its common stock rose to $32.74 per share.

28. During 1985, the Director Defendants became fearful that the turnabout in the company's profits and prospects would prompt a takeover or merger bid by another person or entity, and that they would be ousted from their respective positions of power, prestige and profit as Ashland directors. In addition, the Ashland Board has been struggling for several years to prevent the disclosure of the true facts and circumstances regard-

ing Ashland's payment of $1.35 million to Mont d'Or, a Liechtenstein concern and its loss of $25 million for a 75% stake in a Zimbabwe chromium mine, which were in fact payments intended for officials in Oman as a bribe for certain oil purchases and constituted a violation of the Foreign Corrupt Practices Act and subsequent acts to cover up these payments and avoid prosecution therefore which they can only achieve by maintaining control of Ashland.

29. The Director Defendants, fearful that they would lose their positions of power, prestige and profit at Ashland and to prevent disclosure of information regarding Ashland's illegal payments if a takeover bid was successful, embarked upon a scheme and plan to manipulate the corporate machinery of Ashland so as to make it extremely difficult for any such takeover or merger bid to succeed absent their consent and active support.

30. In furtherance of their scheme to discourage any takeover bids, the Director Defendants recently caused Ashland to change its corporate charter to make takeover attempts more difficult. The Director Defendants, among other acts, caused the company to require staggered terms for its Board of Directors, increased the percentage of shareholder votes necessary to remove any directors, and gave the directors greater ability to effect shareholder actions by, *inter alia,* controlling special shareholder meetings.

31. The above anti-takeover measures were enacted by the Director Defendants for no valid corporate purpose, but rather for the wrongful purpose of preserving themselves in office and continuing to reap the substantial financial and other rewards which they had voted for themselves and for each other and to permit them to cover up and avoid prosecution for their prior violations of law.

32. As a consequence of the above anti-takeover maneuvers, Ashland became a less attractive acquisition target and the market price of Ashland's common stock remained depressed in relation to its earnings and profits and to the true value of its underlying oil and gas refining capacity and other assets.

VIII.

THE BELZBERG GROUP'S PURCHASE OFFER

33. From February 11, 1986 through February 28, 1986, the Belzberg Group, primarily through First City, acquired 1.4 million shares of Ashland common stock at prices ranging from $38½ to $45 per share. In addition, the Belzberg Group, primarily through First City, obtained options to purchase an additional 1.2 million shares of Ashland stock for approximately $48.00 per share.

34. After the initial acquisition of Ashland stock, the Belzberg Group caused analysts from First City to visit Ashland and have discussions with Ashland regarding Ashland's operations and the Belzberg Group's intentions. As a result thereof, and other actions of the Belzberg Group, after the Belzberg Group's acquisitions of Ashland stock had begun, and in part through the actions of Drexel Burnham and the Director Defendants, information began circulating in the investment community that Ashland could be the target of a takeover attempt by an Investor or group of investors who would offer to pay for Ashland common stock a price more in line with the substantial value of Ashland's underlying assets and earnings prospects, and substantially over the then current market price. As a consequence, Ashland's common stock increased in value to approximately $48 per share as of March 24, 1986.

35. On March 25, 1986, Ashland, through the Director Defendants and with the Belzberg Group's knowledge, publicly reported that the Belzberg Group had purchased between 8 and 9 percent of Ashland's outstanding common stock. As a consequence of the disclosure regarding the Belzberg Group's purchase of Ashland stock, the price jumped $3.75 per share to $52 per share on the New York Stock Exchange on March 25, 1986.

36. On March 26, 1986, the Belzberg Group, aided and abetted by Drexel Burnham, filed a Schedule 13D with the Securities and Exchange Commission in which it disclosed that it, primarily through First City, owned or beneficially owned 9.2% of Ashland's outstanding common stock. Attached to the Schedule 13D was a letter that had been sent by defendant Samuel Belzberg to defendant John R. Hall on March 25, 1986, in which the Belzberg Group represented:

> [W]e are prepared today to enter into an agreement providing for the acquisition of 100 percent of the stock of Ashland by First City at a price of $60.00 per share of common stock. If you enter into good faith negotations with us, we believe that working together we can negotiate a higher price for Ashland's shareholders.

The letter further stated that "[a] failure to respond by 5:00 p.m. on Monday, March 31, 1986, will be treated as a rejection of our offer."

37. On March 28, 1986, the Belzberg Group, aided and abetted by Drexel Burnham, filed a Hart-Scott-Rodino disclosure document with the Justice Department and the Federal Trade Commission representing its intent to acquire Ashland and requesting on opinion as to the antitrust implications of its professed acquisition plans.

38. As a consequence of the purchase activities of the Belzberg Group, its Schedule 13D representations and its Hart-Scott-Rodino filing with the Justice Department and the Federal Trade Commission, and the public announcement by the Belzberg Group and the Director Defendants, the shareholders of Ashland had an expectancy of receiving consideration for their Ashland common stock in excess of its historic and then-current market prices and at prices that reflected Ashland's true earnings, earning potential and asset values. During the time prior to the first public disclosure of the Belzberg Group's purchase of Ashland stock on March 25, 1986, until the March 31, 1986 deadline for the Ashland Directors to respond to the purchase offer, Ashland's stock increased from $45⅞ to $55⅛ per share.

IX.

THE BUY BACK AGREEMENT

39. By March 31, 1986, the Director Defendants failed to make any public response to the Belzberg Group's purchase offer. On April 1, 1986, Ashland announced that it had agreed to purchase all of the approximately 2.6 million shares of Ashland common stock owned or controlled by the Belzberg Group for $51 per share, providing them a profit of approximately $15.6 million over the prices paid by the Belzberg Group for its Ashland common stock, and obtained an agreement by First City and the Belzberg Group not to purchase any voting shares in Ashland for the next ten years. The agreement was procured in part by an opinion letter provided to the Belzberg Group by Drexel Burnham in which Drexel Burnham falsely or negligently advised of alleged difficulties in the Belzberg Group's publicly proclaimed plan to acquire Ashland. The representations in the Drexel Burn-

ham opinion were not true, and Drexel Burnham knew, or in the exercise of reasonable and ordinary care would have known, that the representations were not true.

40. The per share price called for in the Buy Back Agreement constituted a substantial premium over and above both the acquisition cost of the Belzberg Group's Ashland stock and the market price for the stock prior to the unlawful influence by the Belzbergs' manipulative activities, and reflected the increase in the price for Ashland stock that had occurred as a consequence of the Belzberg Group's putting Ashland "into play" and its later publicly declared intent to purchase Ashland stock for $60.00 per share. This premium was extracted by the Belzberg Group using its power, influence and shareholdings and for the private sole benefit of the Belzberg Group and was paid from Ashland's assets at the direction of the Director Directors to protect their own positions, despite their respective fiduciary obligations to Ashland and its other shareholders, and constitutes an illegal usurpation and waste of corporate assets and preference of one shareholder to the exclusion and detriment to the interests of the other Ashland shareholders.

41. On April 2, 1986, the Belzberg Group filed Amendment No. 1 to its Schedule 13D in which it disclosed the terms of the Buy Back Agreement. Under the terms of the Buy Back Agreement, Ashland purported to release the Belzberg Group from any liability arising out of the buy back transaction. The Buy Back Agreement was entered into by defendants for no valid or justifiable purpose, and was consummated only to further the selfish and personal interests of the Director Defendants to cement their control over Ashland and to maintain their lucrative and

prestigious corporate positions, to further the interests of the Belzberg Group by extorting the greenmail payoff from Ashland, and to further the interests of Drexel Burnham by the substantial payments for its services in helping consummate the Buy Back Agreement. Such actions were in breach of defendants' respective fiduciary duties to Ashland and the Class and caused substantial injury to both Ashland and the Class.

42. As a part of the Buy Back Agreement, the Belzberg Group, Drexel Burnham and the Director Defendants conspired and cooperated to structure the transaction in a fashion that would serve each of their illegal aims while supporting the market price of Ashland common stock thus concealing the harm inflicted on Ashland and its shareholders by the buy out. To their end the Belzberg Group and the Director Defendants agreed that at the time the buy out of the Belzberg Group was revealed, Ashland's directors would also announce that they would cause the corporation to purchase up to 7.5 million shares of Ashland's common stock (23% of its outstanding stock) at market prices and would issue 5.3 million new shares to an Ashland employee stock ownership plan which the directors control, thus making it virtually impossible for anyone who desires to try to take over Ashland or offer its shareholders a higher price to obtain enough stock to accomplish this end. The 5.3 million shares in the ESOP together with other shares the Board actively controls gives the Ashland directors the power to veto any merger or acquisition of the company via the anti-takeover measures they implemented and thus has given them complete control of the company.

43. As a proximate result of the wrongdoing of the defendants, the market price of Ashland stock was artificially inflated as a consequence of the Belzberg Group's

illusory purchase offer and which decreased in price after announcement of the Buy Back Agreement, despite the efforts of the Director Defendants to prop up the price of Ashland's stock by causing Ashland to buy back some 7.5 million common shares while issuing 5.3 million shares to an Ashland ESOP controlled or greatly influenced by the Board or its members — thus furthering the Director Defendants improper efforts to entrench themselves and prevent a takeover by removing the threat of the Belzberg Group while repurchasing 7.5 million shares from the public float and tightening their control by issuing 5.3 million more shares to an entity they control, dominate and/or influence. Despite these efforts, after the announcement of the Buy Back Agreement, the price of Ashland's common stock traded as low as $46½ per share on April 1, 1986, closed on April 1, 1986 at $49¾ per share and is currently trading at $49⅞ per share.

44. In order to obtain the monies necessary to pay off the Belzberg Group and fund the open market stock repurchase to cement their control of Ashland, the Director Defendants have utilized and will utilize Ashland's corporate assets for their own benefit, depleting Ashland's cash reserves and thus harming Ashland's financial condition. Within 24 hours of the announcement of the pay off of the Belzberg Group and the stock repurchase program, Ashland's credit rating was reduced by the national credit rating agencies and it was placed on "the Credit Watch list with negative implications."

45. The Belzberg Group's greenmail scheme to acquire a large block of Ashland's stock while artificially inflating the market price so that they could sell their 9.2% block to the company at a substantial profit was perpetrated through fraud and deceit and the sale of their stock to the corporation was achieved through a pattern of racketeer-

ing activity, and involved misconduct intentionally designed to circumvent the automatic profit forfeiture provisions for short swing trading of section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p. The predicate acts of racketeering conduct include repeated acts of mail and wire fraud and fraud in the purchase and sale of securities involving the repeated issuance of false and misleading statements to the market place and in SEC and other governmental filings regarding Masonite Corporation, Blue Bell, Inc., U. S. Industries, Hartmarx Corporation, Arvin Industries, Potlatch, Inc. and Ashland Oil. The greenmail payoffs involving these companies were each illegal, a waste and usurpation of the valuable assets of each of these corporations, and was achieved through a breach of the respective fiduciary duties of the Belzberg Group to the other shareholders of these corporations and the corporations themselves.

46. Plaintiff and the members of the Class have no adequate remedy at law.

FIRST CAUSE OF ACTION
(Derivative Action for Intentional Breach of Fiduciary Duty)

47. Plaintiff incorporates by reference paragraphs 1 through 46 above.

48. Aided and abetted by the Belzberg Group and Drexel Burnham, the Director Defendants engaged in the aforesaid conduct in intentional breach and/or reckless disregard of their fiduciary duties to Ashland.

49. Aided and abetted by Drexel Burnham and the Director Defendants, the Belzberg Group engaged in the aforesaid conduct in intentional and/or reckless breach of their fiduciary duties to Ashland.

50. Defendants conspired to abuse, and did abuse, the control and power reposed in the Belzberg Group and the Director Defendants by virtue of their elected positions, their stock ownership, and, in the case of the Belzberg Group, their status as a controlling or dominant shareholder of Ashland.

51. As a proximate result of the matters complained of herein, defendants have unjustly benefitted and will continue to unjustly benefit unless enjoined, and Ashland has sustained damages thereby.

Defendants, and each of them, did the things alleged in this complaint with the intent to injure Ashland and these acts were done maliciously and oppressively and with wanton disregard for the rights of Ashland and in disregard for their fiduciary obligations to Ashland. By reason of the foregoing, defendants are each jointly and severally liable to Ashland for all loss and damage that it has suffered and will suffer resulting from the matters set forth herein and for exemplary and punitive damages.

SECOND CAUSE OF ACTION
(Derivative Action for Negligent Breach of Fiduciary Duty)

53. Plaintiff incorporates by reference paragraphs 1 through 46 above.

54. Aided and abetted by the Belzberg Group and Drexel Burnham, the Director Dedendants engaged in the aforesaid conduct without exercising the reasonable and ordinary care which directors and officers owe to a corporation and its shareholders, and thereby breached their fiduciary duties to Ashland.

55. Aided and abetted by Drexel Burnham and the Director Defendants, the Belzberg Group engaged in the

aforesaid conduct without exercising the reasonable and ordinary care owed to corporations by controlling or dominant shareholders and thereby breached their fiduciary duties to Ashland.

56. As a proximate result of the matters complained of herein, defendants have unjustly benefitted and will continue to unjustly benefit unless enjoined, and Ashland has sustained damages thereby.

57. By reason of the foregoing, defendants are each jointly and severally liable to Ashland for all loss and damage that it has suffered and will suffer resulting from the matters set forth herein.

THIRD CAUSE OF ACTION
(Derivative Action for Abuse of Control)

58. Plaintiff incorporates by reference paragraphs 1 through 46 above.

59. Aided and abetted by the Belzberg Group and Drexel Burnham, the foregoing conduct by the Director Defendants amounted to an abuse of their abilities to control Ashland by causing or permitting Ashland to enact the anti-takeover provisions, to enter into the Buy Back Agreement and to make the illegal greenmail payment, and to pursue additional purchases of Ashland stock to the detriment of Ashland as alleged above.

60. Aided and abetted by Drexel Burnham and the Director Defendants, the foregoing conduct by the Belzberg Group amounted to an abuse of their abilities to control Ashland by usurping Ashland's valuable assets through the greenmail sale of its stock pursuant to the Buy Back Agreement.

61. As a result, Ashland has been damaged and will continue to be damaged unless defendants are enjoined.

62. By reason of the foregoing, defendants are each jointly and severally liable to Ashland for all loss and damage that it has suffered and will suffer resulting from the matters set forth herein.

FOURTH CAUSE OF ACTION

(Derivative Action for Unjust Enrichment)

63. Plaintiff incorporates by reference paragraphs 1 through 46 above.

64. As a proximate result of the tortious conduct described above, the Belzberg Group and Drexel Burnham have been unjustly enriched at Ashland's expense by their receipt of the proceeds of the illegal and wrongful Buy Back Agreement.

65. The Belzberg Group and Drexel Burnham should be required to disgorge the respective payments and gains which they unjustly obtained at the expense of Ashland, and a constructive trust for the benefit of Ashland should be imposed thereon.

FIFTH CAUSE OF ACTION

(Derivative Action for Waste and Usurpation of Corporate Assets)

66. Plaintiff incorporates by reference paragraphs 1 through 46 above.

67. Aided and abetted by the Belzberg Group and Drexel Burnham, the Director Defendants engaged in a waste and usurpation of the valuable assets of Ashland through payment of approximately $133 million under the

Buy Back Agreement, resulting, *inter alia,* in a downgrading of Ashland's commercial paper which will make it more costly for Ashland to borrow in the commercial markets. The foregoing actions were taken by the Director Defendants for the purpose of maintaining their lucrative and prestigious positions with Ashland and without concern for their fiduciary obligations to Ashland.

68. Aided and abetted by Drexel Burnham and the Director Defendants, the Belzberg Group engaged in a waste and usurpation of the valuable assets of Ashland through receipt of the approximately $133 million greenmail payment from Ashland under the Buy Back Agreement resulting, *inter alia*, in a downgrading of Ashland's commercial paper which will make it more costly for Ashland to borrow in the commercial makets. The foregoing actions were taken by Belzberg Group for the sole purpose of enriching themselves and in breach of their duties as dominant or controlling shareholders of Ashland.

69. By reason of the foregoing, defendants are each jointly and severally liable to Ashland for all loss and damage that it has suffered and will suffer resulting from the matters set forth herein.

SIXTH CAUSE OF ACTION
(Derivative Action for Unfair Trade Practice)

70. Plaintiff incorporates by reference paragraphs 1 through 46 above.

71. Aided and abetted by the Belzberg Group and Drexel Burnham, the Director Defendants caused Ashland to distribute Ashland's assets to buy back all of the Ashland common shares held by the Belzberg Group at a

premium and on terms unfair to Ashland and its other shareholders. The distribution was unfair to Ashland and was in preference to the Belzberg Group's shares over those of plaintiff and other Ashland shareholders.

72. Aided and abetted by the Director Defendants and Drexel Burnham, the Belzberg Group has engaged in a pattern of unfair business practices, including its misrepresentations regarding Ashland, its greenmailing of Ashland and its other greenmail activity, by which it obtained an unfair distribution of Ashland's assets.

73. The distribution of Ashland assets to the Belzberg Group as complained of herein constitutes an unfair trade practice. The unfair preferential distribution must be set aside through rescission of the Buy Back Agreement, return of the monetary consideration to Ashland, and return of the shares to the Belzberg Group.

SEVENTH CAUSE OF ACTION

(Derivative Action for Violation of §§ 1962(b) and/or (c) and/or (d) of the Racketeer Influenced and Corrupt Organizations Act of 1970)

74. Plaintiff incorporates by reference paragraphs 1 through 46 above.

75. The Director Defendants and the Belzberg Group owed to Ashland and its shareholders the highest duty of loyalty and honesty in conducting the affairs of Ashland in a lawful manner. These defendants, aided and abetted by defendant Drexel Burnham, knowingly, recklessly, or otherwise culpably breached their fiduciary duties to Ashland and its shareholders by, *inter alia,* entering into the Buy Back Agreement, wasting and usurping the valuable assets of Ashland for the selfish purpose of maintaining the Director Defendants in their lucrative

positions of profit and prestige with Ashland and to obtain the greenmail payoff for the Belzberg Group.

76. The defendants were, at times relevant to the events alleged herein, all associated with enterprises engaged in interstate and foreign commerce and the activities of which effect interstate commerce. Those enterprises are Ashland and the Belzberg Group, or, in the alternative, an association in fact of the defendants and their affiliated companies.

77. The defendants have conspired to acquire and maintain, and have acquired and maintained, directly or indirectly, an interest in or control of the enterprises set forth in paragraph 76 through a pattern of racketeering activity, consisting of repeated acts of mail fraud violative of 18 U.S.C. § 1341, repeated acts of mail fraud violative of 18 U.S.C. § 1343, repeated breaches of fiduciary duties owed to Ashland and its shareholders and the other targets of the Belzberg Group's greenmail constituting mail and wire fraud violative of 18 U.S.C. §§ 1341 and 1343, and repeated acts of securities fraud. Each of defendants' racketeering activities was taken for the purpose of furthering defendants' common scheme to acquire control of Ashland, to perpetrate the Director Defendants in their lucrative positions of profit and prestige and to obtain the greenmail payoff for the Belzberg Group, and as to Drexel Burnham, in furtherance of its scheme to obtain substantial payments for the services it rendered in its active participation and vital role in consummating the Buy Back Agreement, and each such act had similar purposes, involved the same or similar participants and methods of commission, and had similar results impacting similar victims, and thus constituted a pattern of racketeering activity within the meaning of RICO.

78. The defendants have conspired to conduct, and have conducted, directly or indirectly, an interest in or control of the enterprises set forth in paragraph 76 through a pattern of racketeering activity, consisting of repeated acts of mail fraud violative of 18 U.S.C. § 1341, repeated acts of wire fraud violative of 18 U.S.C. § 1343, repeated breaches of fiduciary duties owed to Ashland and its shareholders and the other targets of the Belzberg Group's greenmail constituting mail and wire fraud violative of 18 U.S.C. §§ 1341 and 1343, and repeated acts of securities fraud. Each of defendants' racketeering activities was taken for the purpose of furthering defendants' common scheme to acquire control of Ashland, to perpetrate the Director Defendants in their lucrative positions of profit and prestige and to obtain the greenmail payoff for the Belzberg Group, and as to Drexel Burnham, in furtherance of its scheme to obtain substantial payments for the services it rendered in its active participation and vital role in consummating the Buy Back Agreement, and each such act had similar purposes, involved the same or similar participants and methods of commission, and had similar results impacting similar victims, and thus constituted a pattern of racketeering activity within the meaning of RICO.

79. As a direct and proximate result of the defendants' illegal activities violative of RICO, 18 U.S.C. § 1961-1968, Ashland has been injured in its business and property in that it has suffered the loss of at least $133 million through the greenmail payoff to the Belzberg Group, and the substantial impairment of its credit rating. Plaintiff requests that Ashland recover three times the damages to Ashland as a result of all the defendants' racketeering activity, and that the Belzberg Group be required to pay Ashland three times the damages for the injury and/or

profits that it has caused or obtained from all its racketeering activity.

EIGHTH CAUSE OF ACTION
(Derivative Action for Violation of §§ 1962(a) and/or (d) of the Racketeer Influenced and Corrupt Organizations Act of 1970)

80. Plaintiff incorporates by reference paragraphs 1 through 46 above.

81. The Director Defendants and the Belzberg Group owed to Ashland and its shareholders the highest duty of loyalty and honesty in conducting the affairs of Ashland in a lawful manner. These defendants, aided and abetted by defendant Drexel Burnham, knowingly, recklessly, or otherwise culpably breached their fiduciary duties to Ashland and its shareholders by, *inter alia,* entering into the Buy Back Agreement, wasting and usurping the valuable assets of Ashland for the selfish purpose of maintaining the Director Defendants in their lucrative positions of profit and prestige with Ashland and to obtain the greenmail payoff for the Belzberg Group.

82. The defendants were, at times relevant to the events alleged herein, all associated with enterprises engaged in interstate and foreign commerce and the activities of which effect interstate commerce. Those enterprises are Ashland and the Belzberg Group, or, in the alternative, an association in fact of the defendants and their affiliated companies.

83. The defendants have received, directly or indirectly, income derived from a pattern of racketeering activity, consisting of repeated acts of mail fraud violative of 18 U.S.C. § 1341, repeated acts of wire fraud violative of 18 U.S.C. § 1343, repeated breaches of fiduciary duties

owed to Ashland and its shareholders and the other targets of the Belzberg Group's greenmail constituting mail and wire fraud violative of 18 U.S.C. §§ 1341 and 1343, and repeated acts of securities fraud. Each of defendants' racketeering activities was taken for the purpose of furthering defendants' common scheme to acquire control of Ashland, to perpetrate the Director Defendants in their lucrative positions of profit and prestige and to obtain the greenmail payoff for the Belzberg Group, and as to Drexel Burnham, in furtherance of its scheme to obtain substantial payments for the services it rendered in its active participation and vital role in consummating the Buy Back Agreement, and each such act had similar purposes, involved the same or similar participants and methods of commission, and had similar results impacting similar victims, and thus constituted a pattern of racketeering activity within the meaning of RICO.

84. As a direct and proximate result of the defendants' illegal activities violative of RICO, 18 U.S.C. § 1961-1968, Ashland has been injured in its business and property in that it has suffered the loss of at least $133 million through the greenmail payoff to the Belzberg Group, and the substantial impairment of its credit rating. Plaintiff requests that Ashland recover three times the damages to Ashland as a result of all the defendants' racketeering activity, and that the Belzberg Group be required to pay Ashland three times the damages for the injury and/or profits that it has caused or obtained from all its racketeering activity.

NINTH CAUSE OF ACTION
(Derivative Action for Violation of
§ 17(a)(1) of the Securities Act of 1933)

85. Plaintiff incorporates by reference paragraphs 1 through 46 above.

86. Each of the defendants knew or recklessly disregarded the fact that the statements contained in the public statements by defendants, including, but not limited to, the public statements by the Director Defendants on March 25, 1986, the March 26, 1986 Schedule 13D filing by the Belzberg Group, the March 28, 1986 Hart-Scott-Rodino filing by the Belzberg Group, and the April 2, 1986 Amendment No. 1 to the Schedule 13D filed by the Belzberg Group were untrue and that these public statements omitted to state material facts required to be stated in order to make the statements contained therein not misleading and engaged in transactions, practices and a course of business which operated as a fraud or deceit upon Ashland and the Class.

87. None of the false and misleading statements and omissions contained in the public statements were known to Ashland at the time it acquired the Ashland common stock owned by the Belzberg Group.

88. As a result of defendants' wrongful conduct, as hereinabove alleged, the market price for Ashland common stock was artificially inflated and Ashland suffered substantial damage in that defendants were able to consummate the Buy Back Agreement, including Ashland's proposed purchase of 7.5 million shares of stock at prices artificially inflated by defendants' wrongful conduct, for the sole and exclusive purpose of perpetrating the Director Defendants in their lucrative positions of power,

prestige and profit, and the Belzberg Group was able to extort its greenmail payoff from Ashland.

89. By reason of the foregoing, defendants are each jointly and severally liable to Ashland for all loss and damage that it has suffered and will suffer resulting from the matters set forth herein.

TENTH CAUSE OF ACTION
(Class Action for Intentional Breach of Fiduciary Duty)

90. Plaintiff incorporates by reference paragraphs 1 through 46 above.

91. Aided and abetted by the Belzberg Group and Drexel Burnham, the Director Defendants engaged in the aforesaid conduct in intentional breach and/or reckless disregard of their fiduciary duties to plaintiff and the members of the Class.

92. Aided and abetted by Drexel Burnham and the Director Defendants, the Belzberg Group engaged in the aforesaid conduct in breach of their fiduciary duties to plaintiff and the members of the Class.

93. Defendants, at the time they agreed to enter into the Buy Back Agreement, knew that the market price of Ashland stock reflected both the intrinsic value of Ashland and a premium which resulted from market expectations that the Belzberg Group's efforts to acquire 100 percent (100%) of Ashland's stock would produce greater returns for investors.

94. Defendants were aware, therefore, that if they breached their duty to the shareholders described above, the immediate effect would be a collapse of the market price of Ashland stock.

95. In fact, as a direct, proximate and foreseeable result of the defendants' actions described above, the market price of Ashland stock did collapse, falling as much as $5.00 per share on the day the Buy Back Agreement was announced.

96. As a proximate result, the plaintiff and other members of the Class have been substantially injured. This injury is separate and distinct from the injury suffered by Ashland as a result of the wrongful conduct alleged above.

97. Defendants, and each of them, did the things alleged in this complaint with the intent to injure plaintiff and other members of the Class and these acts were done maliciously and oppressively and with wanton disregard for the rights of plaintiff and the other members of the Class. By reason of those acts, plaintiff demands exemplary and punitive damages against each defendant.

98. Plaintiff and the members of the Class have no adequate remedy at law.

ELEVENTH CAUSE OF ACTION
(Class Action for Negligent
Breach of Fiduciary Duty)

99. Plaintiff incorporates by reference paragraphs 1 through 46 above.

100. Aided and abetted by the Belzberg Group and Drexel Burnham, the Director Defendants engaged in the aforesaid conduct without exercising the reasonable and ordinary care which directors and officers owe to its shareholders, and thereby breached their fiduciary duties to plaintiff and other members of the Class.

101. Aided and abetted by Drexel Burnham and the Director Defendants, the Belzberg Group engaged in the aforesaid conduct without exercising the reasonable and ordinary care owed to shareholders by controlling or dominant shareholders.

102. Defendants, at the time they entered into the Buy Back Agreement, knew or should have known that the market price of Ashland stock at the time reflected both the intrinsic value of Ashland and a premium which resulted from market expectations that the Belzberg Group's efforts to acquire 100 percent (100%) of Ashland's stock would produce greater returns for investors.

103. Defendants were aware, or should have been aware, that if they breached their duty to the shareholders described above, the immediate effect would be a collapse of the market price of Ashland stock.

104. In fact, as a direct, proximate and foreseeable result of the defendants' actions described above, the market price of Ashland stock did collapse, falling as much as $5.00 per share on the day the Buy Back Agreement was announced.

105. As a proximate result, the plaintiff and other members of the Class have been substantially injured. This injury is separate and distinct from the injury suffered by Ashland as a result of the wrongful conduct alleged above.

106. Defendannts did the things alleged in the complaint without exercising the reasonable and ordinary care owed by dominant or controlling shareholders, and plaintiff and the other members of the Class have been injured thereby.

107. Plaintiff and the members of the Class have no adequate remedy at law.

TWELFTH CAUSE OF ACTION
(Class Action for Abuse of Control)

108. Plaintiff incorporates by reference paragraphs 1 through 46 above.

109. The Director Defendants and the Belzberg Group owed duties as controlling persons and/or as controlling or dominate shareholders to plaintiff and the other members of the Class not to use their positions of control of Ashland for their own personal interests and contrary to the interests of Ashland's remaining shareholders.

110. Aided and abetted by the Belzberg Group and Drexel Burnham, the foregoing conduct by the Director Defendants amounted to an abuse of their abilities to control Ashland in violation of their obligations to plaintiff and the other members of the Class.

111. Aided and abetted by Drexel Burnham and the Director Defendants, the foregoing conduct by the Belzberg Group amounted to an abuse of their positions as controlling and dominant shareholders of Ashland in violation of their obligations to plaintiff and the other members of the Class.

112. As a result, plaintiff and the other members of the Class have been damaged and will continue to be damaged unless defendants are enjoined, and defendants are each jointly and severally liable to plaintiff and the other members of the Class for all loss and damage they have suffered resulting from the matters set forth herein.

113. Plaintiff and the members of the Class have no adequate remedy at law.

THIRTEENTH CAUSE OF ACTION
(Class Action for Fraud and Deceit)

114. Plaintiff incorporates by reference paragraphs 1 through 46 above.

115. For the purpose of inducing public investors, including plaintiff and other members of the Class, to purchase or hold Ashland common stock, and with an intent to deceive such investors, the Director Defendants and the Belzberg Group, aided and abetted by Drexel Burnham, employed a scheme and conspiracy to defraud, as a part of which they made, participated in the making of, or aided and abetted in the making of the misrepresentations of fact to plaintiff and the other members of the Class as herein described, and as a part of which defendants concealed the truth, and being bound to disclose, omitted to state material facts as set forth above. The misrepresentations and omissions included, *inter alia,* the misrepresentations included in the March 25, 1986 announcement by the Director Defendants, the Belzberg Group's March 25, 1986 letter to defendant John R. Hale that the Blezberg Group was prepared to acquire 100 percent (100%) of the Ashland common stock for $60.00 per share (or higher if the Director Defendants cooperated in good faith), while failing to disclose the Director Defendants' scheme to enact anti-takeover measures to secure their positions with Ashland, and that the anticipated Belzberg Group $60.00 per share offer was illusory and part of the Belzberg Group's and Drexel Burnham's scheme to artificially inflate the price of Ashland stock so that the Belzberg Group could reap its substantial greenmail profit through the Buy Back Agreement. Said representations and statements were not true and the defendants did not believe them to be true. Said acts by

the defendants were fraudulent, oppressive and malicious.

116. Plaintiff and the other members of the Class, at the time of said representations and omissions, were ignorant of the falsity of these statements, and believed them to be true. In reliance upon said misrepresentations, the integrity of the market and securities offering process, and the fidelity, integrity and superior knowledge of the Director Defendants and the Belzberg Group, and in ignorance of the truth, plaintiff and the other members of the Class were induced to and did purchase or hold Ashland common stock. Had plaintiff and the other members of the Class known the truth, they would not have taken such action.

117. By reason of the foregoing conduct by the defendants, plaintiff and the other members of the Class have suffered injury by the diminution of the value of their investment in Ashland. Plaintiff, individually and on behalf of the Class, also requests punitive and exemplary damages.

FOURTEENTH CAUSE OF ACTION

(Class Action for Violation of § 1962(b) and/or (c) and/or (d) of the Racketeer Influenced and Corrupt Organizations Act of 1970)

118. Plaintiff incorporates by reference paragraphs 1 through 46 above.

119. The Director Defendants and the Belzberg Group owed to Ashland and its shareholders the highest duty of loyalty and honesty in conducting the affairs of Ashland in a lawful manner. These defendants, aided and abetted by defendant Drexel Burnham, knowingly, recklessly, or otherwise culpably breached their fiduciary duties to

Ashland and its shareholders by, *inter alia*, artificially inflating the market price of Ashland's common stock, entering into the Buy Back Agreement, wasting and usurping the valuable assets of Ashland for the selfish purpose of maintaining the Director Defendants in their lucrative positions of profit and prestige with Ashland and to obtain the greenmail payoff for the Belzberg Group.

120. The defendants were, at times relevant to the events alleged herein, all associated with enterprises engaged in interstate and foreign commerce and the activities of which effect interstate commerce. Those enterprises are Ashland and the Belzberg Group, or, in the alternative, an association in fact of the defendants and their affiliated companies.

121. The defendants have conspired to acquire and maintain, and have acquired and maintained, directly or indirectly, an interest in or control of the enterprises set forth in paragraph 120 through a pattern of racketeering activity, consisting of repeated acts of mail fraud violative of 18 U.S.C. § 1341, repeated acts of wire fraud violative of 18 U.S.C. § 1343, repeated breaches of fiduciary duties owed to Ashland and its shareholders and the other targets of the Belzberg Group's greenmail constituting mail and wire fraud violative of 18 U.S.C. §§ 1341 and 1343, and repeated acts of securities fraud. Each of defendants' racketeering activities was taken for the purpose of furthering defendants' common scheme to acquire control of Ashland, to perpetrate the Director Defendants in their lucrative positions of profit and prestige and to obtain the greenmail payoff for the Belzberg Group, and as to Drexel Burnham, in furtherance of its scheme to obtain substantial payments for the services it rendered in its active participation and vital role in consummating

the Buy Back Agreement, and each such act had similar purposes, involved the same or similar participants and methods of commission, and had similar results impacting similar victims, and thus constituted a pattern of racketeering activity within the meaning of RICO.

122. The defendants have conspired to conduct, and have conducted, directly or indirectly, an interest in or control of the enterprises set forth in paragraph 120 through a pattern of racketeering activity, consisting of repeated acts of mail fraud violative of 18 U.S.C. § 1341, repeated acts of wire fraud violative of 18 U.S.C. § 1343, repeated breaches of fiduciary duties owed to Ashland and its shareholders and the other targets of the Belzberg Group's greenmail constituting mail and wire fraud violative of 18 U.S.C. §§ 1341 and 1343, and repeated acts of securities fraud. Each of defendants' racketeering activities was taken for the purpose of furthering defendants' common scheme to artificially inflate the market price of Ashland common stock, to acquire control of Ashland, to perpetrate the Director Defendants in their lucrative positions of profit and prestige and to obtain the greenmail payoff for the Belzberg Group, and as to Drexel Burnham, in furtherance of its scheme to obtain substantial payments for the services it rendered in its active participation and vital role in consummating the Buy Back Agreement, and each such act had similar purposes, involved the same or similar participants and methods of commission, and had similar results impacting similar victims, and thus constituted a pattern of racketeering activity within the meaning of RICO.

123. As a direct and proximate result of the defendants' illegal activities violative of RICO, 18 U.S.C. § 1961-1968, plaintiff and the other members of the Class have been injured in their business and property.

FIFTEENTH CAUSE OF ACTION

(Class Action for Violation of §§ 1962(a) and/or (d) of the Racketeer Influenced and Corrupt Organizations Act of 1970)

124. Plaintiff incorporates by reference paragraphs 1 through 46 above.

125. The Director Defendants and the Belzberg Group owed to Ashland and its shareholders the highest duty of loyalty and honesty in conducting the affairs of Ashland in a lawful manner. These defendants, aided and abetted by defendant Drexel Burnham, knowingly, recklessly, or otherwise culpably breached their fiduciary duties to Ashland and its shareholders by, *inter alia*, artificially inflating the market price of Ashland's common stock, entering into the Buy Back Agreement, wasting and usurping the valuable assets of Ashland for the selfish purpose of maintaining the Director Defendants in their lucrative positions of profit and prestige with Ashland and to obtain the greenmail payoff for the Belzberg Group.

126. The defendants were, at times relevant to the events alleged herein, all associated with enterprises engaged in interstate and foreign commerce and the activities of which effect interstate commerce. Those enterprises are Ashland and the Belzberg Group, or, in the alternative, an association in fact of the defendants and their affiliated companies.

127. The defendants have received, directly or indirectly, income derived from a pattern of racketeering activity, consisting of repeated acts of mail fraud violative of 18 U.S.C. § 1341, repeated acts of wire fraud violative of 18 U.S.C. § 1343, repeated breaches of fiduciary duties owed to Ashland and its shareholders and the other

targets of the Belzberg Group's greenmail constituting mail and wire fraud violative of 18 U.S.C. §§ 1341 and 1343, and repeated acts of securities fraud. Each of defendants' racketeering activities was taken for the purpose of furthering deffendants' common scheme to artificially inflate the market price of Ashland common stock, to acquire control of Ashland, to perpetrate the Director Defendants in their lucrative positions of profit and prestige and to obtain the greenmail payoff for the Belzberg Group, and as to Drexel Burnham, in furtherance of its scheme to obtain substantial payments for the services it rendered in its active participation and vital role in consummating the Buy Back Agreement, and each such act had similar purposes, involved the same or similar participants and methods of commission, and had similar results impacting similar victims, and thus constituted a pattern of racketeering activity within the meaning of RICO.

128. As a direct and proximate result of the defendants' illegal activities violative of RICO, 18 U.S.C. § 1961-1968, plaintiff and the other members of the Class have been injured in their business and property.

SIXTEENTH CAUSE OF ACTION

(Class Action for Violation of § 17(a)(1) of the Securities Act of 1933)

129. Plaintiff incorporates by reference paragraphs 1 through 46 above.

130. Each of the defendants knew or recklessly disregarded the fact that the statements contained in the public statements by defendants, including, but not limited to, the public statements by the Director Defendants on March 25, 1986, the March 26, 1986 Schedule 13D

filing by the Belzberg Group, the March 28, 1986 Hart-Scott-Rodino filing by the Belzberg Group, and the April 2, 1986 Amendment No. 1 to the Schedule 13D filed by the Belzberg Group were untrue and that these public statements omitted to state material facts required to be stated in order to make the statements contained therein not misleading and engaged in transactions, practices and a course of business which operated as a fraud or deceit upon Ashland and the Class.

131. None of the false and misleading statements and omissions contained in the public statements were known to plaintiff or the other members of the Class at the time they purchased or held their Ashland common stock.

132. As a result of defendants' wrongful conduct, as hereinabove alleged, defendants employed a scheme, device or artifice to defraud in that they made untrue statements of material fact or omitted material facts, and engaged in conduct intended to and which did operate as fraud and deceit upon plaintiff and other members of the Class. As a consequence, the market price for Ashland common stock was artificially inflated and plaintiff and the Class suffered substantial damages in connection with their purchases or retention of Ashland stock.

133. By reason of the foregoing, defendants are each jointly and severally liable to plaintiff and the other members of the Class for all loss and damage they have suffered resulting from the matters set forth herein.

WHEREFORE, plaintiff seeks judgment, jointly and severally, against all defendants as follows:

Class Actions:

A. Declaring Counts 10, 11, 12, 13, 14, 15 and 16 of this action to be a class action pursuant to section 382 of the California Code of Civil Procedure.

B. For exemplary and punitive damages.

C. As to Counts 14 and 15, requiring the defendants to pay plaintiff and the other members of the Class three times the amount by which plaintiff and the other members of the Class have been damaged, and requiring the Belzberg Group to pay plaintiff and the other members of the Class three times the amount which the Belzberg Group has obtained through all its racketeering activities.

D. Directing all defendants, and each of them, to account to the plaintiff and the other members of the Class for all damages and injuries sustained and to be sustained as a result of the acts and transactions alleged herein.

E. Awarding reasonable fees to class plaintiffs' attorneys and experts, plus expenses incurred in the prosecution of this action, and directing defendants to pay all court costs.

F. Awarding pre-judgment and post-judgment interest on all amounts awarded to the maximum extent permitted by law or in equity.

G. Awarding preliminary and permanent injunctive relief enjoining the consummation of the Buy Back Agreement and preventing the further dissipation of Ashland assets and imposing a constructive trust upon the Belzberg Group of defendants, including First City Financial, for all funds received from Ashland, and requiring the Belzberg Group to place its greenmail profits in a separate trust account.

H. Granting such other and further relief as may be just and proper.

Derivative Actions:

A. Enjoining, preliminarily and permanently, the Buy Back Agreement; declaring the Buy Back Agreement null and void; and ordering the Buy Back Agreement to be rescinded and unwound to the extent, if at all, it has been effectuated.

B. Establishing an equitable trust of any monies received by the Belzberg Group, and their affiliates and related persons, from Ashland in connection with the Buy Back Agreement to be held for the benefit of Ashland and its shareholders.

C. As to Counts 7 and 8, requiring the defendants to pay Ashland three times the amount by which the company has been damaged by reason of the conduct complained of herein, and requiring the Belzberg Group to pay Ashland three times the amount which the Belzberg Group has obtained through all its racketeering activities.

C. Awarding damages against all defendants in an amount to be proven at trial.

E. For exemplary and punitive damages.

F. Directing that all defendants account for all damages caused by them and all profits and special benefits and unjust enrichment they have obtained as a result of their unlawful conduct.

G. Awarding pre-judgment and post-judgment interest on all amounts awarded to the maximum extent permitted by law or in equity.

H. Awarding to the derivative plaintiff the costs and disbursements of this action, including a reasonable allowance for the fees and expenses of derivative plaintiff's attorneys and experts.

I. Granting such other and further relief as may be just and proper.

DATED: April 14, 1987

MILBERG WEISS BERSHAD
SPECTHRIE & LERACH
WILLIAM S. LERACH
EUGENE MIKOLAJCZYK

By: WILLIAM S. LERACH
2000 Central Savings Tower
225 Broadway
San Diego, California 92101
Telephone: (619) 231-1058

DAVID B. GOLD, A PROFESSIONAL
LAW CORPORATION
DAVID B. GOLD
120 Montgomery St., Suite 650
San Francisco, California 94104
Telephone: (415) 981-2440
Attorneys for Plaintiff

JURY DEMAND

Plaintiff demands a trial by jury.

DATED: April 14, 1986

MILBERG WEISS BERSHAD
SPECTHRIE & LERACH
WILLIAM S. LERACH
EUGENE MIKOLAJCZYK

By: WILLIAM S. LERACH
2000 Central Savings Tower
225 Broadway
San Diego, California 92101
Telephone: (619) 231-1058

DAVID B. GOLD, A PROFESSIONAL
LAW CORPORATION
DAVID B. GOLD
120 Montgomery St., Suite 650
San Francisco, California 94104
Telephone: (415) 981-2440
Attorneys for Plaintiff

VERIFICATION OF COMPLAINT

I, WILLIAM S. LERACH, declare:

1. I am one of the attorneys for the named plaintiff in the foregoing action.

2. I make this Declaration as Verification because my client, the named plaintiff, is absent from and does not reside in San Diego County, California where I maintain my office.

3. I have read the foregoing complaint, and am informed and believe the matters therein to be true and on that ground allege that the matters stated therein are true to the best of my knowledge, information and belief based on my investigation.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day of April, 1986, in San Diego, California.

WILLIAM S. LERACH

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. 0A000983
CLASS ACTION

PAULINE MICKLER, and/or Pauline Mickler as
Executrix of the Estate of Arthur Mickler,
Plaintiff

vs.

WILLIAM BELZBERG, HYMAN BELZBERG, SAMUEL BELZBERG, MARC BELZBERG, FIRST CITY FINANCIAL CORPORATION LTD., FIRST CITY TRUST COMPANY, ROXBORO INVESTMENTS (1976) LTD., BEL-FRAN INVESTMENTS LTD., BEL-CAL HOLDINGS LTD., BEL-ALTA HOLDINGS LTD., DREXEL BURNHAM LAMBERT INCORPORATED, MICHAEL MILKEN, JOHN R. HALL, ROBERT T. MCCOWAN, WILLIAM R. SEATON, CHARLES J. LUELLEN, SAMUEL C. BUTLER, EUGENE W. ERIKSON, JAMES B. FARLEY, ROBERT D. GORDON, WALTER W. HILLENMEYER, JR., DON T. MCKONE, HAROLD S. MOHLER, GROVER E. MURRAY, JANE C. PFEIFFER, ROBERT S. REIGELUTH, JAMES R. RINEHART, F. H. ROSS, JR., ROBERT B. STOBAUGH, RICHARD L. TERRELL, JAMES W. VANDEREER,
and DOES 1 through 500,
Defendants,

ASHLAND OIL, INC.,
Nominal Defendant.

Plaintiff Demands a Trial By Jury

(Class Action and Shareholder Derivative Action)

VERIFIED CLASS ACTION AND
SHAREHOLDER'S DERIVATIVE COMPLAINT FOR

BREACH OF FIDUCIARY DUTY, ABUSE OF CONTROL, WASTE OF CORPORATE ASSETS, UNJUST ENRICHMENT, UNFAIR TRADE PRACTICES, AND PAYMENT OF ILLEGAL PREMIUMS

WILLIAM S. LERACH
EUGENE MIKOLAJCZYK
MILBERG WEISS BERSHAD SPECTHRIE & LERACH
200 Central Savings Tower
225 Broadway
San Diego, California 92101
Telephone: (619) 231-1058

DAVID B. GOLD
DAVID B. GOLD, A PROFESSIONAL LAW CORPORATION
120 Montgomery Street,
Suite 650
San Francisco, California 94104
Telephone: (415) 981-2440

ERWIN A. SHERMAN
LYNCH, SHERMAN & COX
1800 Meidinger Tower
Louisville, Kentucky 40202
Telephone: (502) 589-4215

MERRILL G. DAVIDOFF
SHERRIE R. SAVETT
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 875-3000

Attorneys for Plaintiff

Plaintiff through this Verified Complaint alleges as follows:

I.

NATURE OF ACTION

1. This is a shareholder's derivative action on behalf of Ashland Oil, Inc. ("Ashland") and also a class action on behalf of all persons, except defendants, who owned shares of the common stock of Ashland on April 1, 1986, the day Ashland revealed that it had repurchased all the Ashland stock owned by entities controlled by the Belzberg family at a large profit to them and to the detriment of Ashland and the remaining shareholders, as part of an overall arrangement designed to reduce the public float of Ashland shares, place a controlling block of Ashland stock in an entity controlled by and loyal to the Ashland Board and perpetuate the Ashland directors in their positions of power, prestige and profit as Ashland directors and officers. The defendants are members of the Belzberg family and certain entities controlled and/or utilized by them to pursue the wrongs complained of herein, Drexel Burnham Lambert Incorporated ("Drexel Burnham") and one of its principals which assisted the Belzberg defendants, and the Ashland Directors. As hereinafter set forth, the Belzbergs acquired a dominant and controlling block of Ashland common stock. At the time the Belzbergs sold their stock to Ashland they were dominant and controlling shareholders of the company and thereby owed to the other shareholders and Ashland a fiduciary responsibility and were required to use their dominant and controlling position in a fair, just and equitable manner. Instead these defendants, by reason of the conduct hereinafter alleged, used their dominant and controlling positions to extract a $15.6 million premium for themselves as well as other consideration to the detriment of Ashland and its shareholders.

2. During the period February 11, 1986, through March 25, 1986, the Belzbergs accumulated 1.4 million shares of Ashland common stock at prices ranging from $38½ to $45 per share, and options to purchase an additional 1.2 million shares, and on March 26, 1986 made an announcement to the investing public that they intended to purchase for "at least $60.00 per share" 100% of Ashland's outstanding common stock. The foregoing announcement by the Belzbergs was a misrepresentation as the Belzbergs had no intention of acquiring 100% of Ashland's outstanding common stock for "at least $60.00 per share." Instead, the announcement by the Belzbergs was part of a course of conduct pursued by the Belzbergs to inflate the price at which Ashland's common stock was trading and to greenmail the company so as to extract a premium for the Belzbergs' controlling block of stock. On April 1, 1986, aided by the Drexel Burnham defendants, the Belzbergs used their power to influence Ashland's corporate behavior to cause Ashland's directors to purchase the 2.6 million Ashland shares owned or controlled by the Belzbergs for $51.00 per share, or $133 million, thus providing a $15.6 million profit for the Belzbergs in just over 60 days. The Belzberg defendants and the Ashland Board further agreed to cause Ashland to offer to purchase 7.5 million shares of Ashland stock on the open market while selling 5.3 million shares to an Ashland ESOP controlled by the Ashland Board, thus reducing the possibility of an outside takeover of Ashland and further securing the Ashland directors' control and dominance of Ashland and their Board/Officers' positions. The agreement had no valid or justifiable business purpose and was consummated only to further the interests of the Ashland directors and the Belzbergs. After the repurchase, Ashland's stock fell in price below that paid to the Belzbergs and Ashland's credit standing was

placed on the Credit Watch list with "negative implications" by the leading national credit rating agencies.

3. The members of the Class have been damaged by purchasing or holding Ashland stock at prices inflated by the manipulations and wrongful conduct of the defendants, by the diversion of an unfairly disproportionate share of corporate assets to the Belzbergs, and the anti-takeover measures pursued by the Ashland directors including the recent "poison pill" preference stock tactic, all of which have decreased the intrinsic value of the Ashland shares and which actions were perpetrated solely to serve the private and selfish interests of Ashland's directors and Ashland's largest and controlling shareholder, *i.e.*, the Belzberg family and its corporate enterprises. Ashland has also been damaged by the wasting of its corporate assets and the harming of its financial condition by the spending of approximately $133 million of its corporate assets to pay off the Belzbergs and a much larger sum — some $350 million to repurchase another 7.5 million shares from public hands — all to prevent the consummation of any takeover which would oust the incumbent Board from its control of Ashland. The defendants have followed and are following a concerted course of conduct, and have aided and abetted each other and the Belzberg defendants and the Ashland directors in the commission of practices and conduct violative of their respective statutory and fiduciary duties to Ashland and its shareholders and have thereby been unjustly enriched, which harmed both Ashland and its other shareholders. Included in such unfair, deceptive and unlawful acts are defendants' failure to make timely, proper and true disclosure of the actual facts concerning and reasons for the transactions alleged herein. Plaintiff seeks redress for these wrongs under applicable theories of intentional or negligent breach of fiduciary duty, abuse of control, waste

of corporate assets, unjust enrichment, unfair trade practices and payment of illegal premiums, and seeks provisional or injunctive relief on behalf of Ashland and the Class of shareholders sued for as specified herein. No claims arising under federal law are asserted herein, but rather only claims arising under California and/or Kentucky law.

II. —

JURISDICTION AND VENUE

4. The injuries and damages complained of herein occurred, in part, in Los Angeles County, California, in that, *inter alia,* defendants knew or could reasonably have expected that the impact of their wrongful conduct would be felt by Ashland shareholders residing there. As of April 23, 1986 there were approximately 1,800 registered Ashland shareholders resident in California, and an additional and large number of beneficial owners of Ashland stock reside in California as well. Ashland is registered to conduct business in California, has operating subsidiaries in California and has a designated agent to receive service of process in Los Angeles, California. Each of the Belzberg brothers has been personally present in California on business in recent years in carrying out the extensive financial activities that they pursue as a group — as co-venturers and co-participants. The Belzberg brothers are also generous backers of charitable projects located in Los Angeles which they have all personally visited. The Belzberg brothers and First City Financial Corporation, Ltd., a corporation they control, also regularly conduct business in California, in part, through defendant William Belzberg who is a citizen of the State of California and a resident of Beverly Hills, California, through Far West Financial Corporation, a California

corporation controlled by the Belzbergs which maintains its principal office in Newport Beach, California and has operations in Los Angeles County, and through First City Properties of Beverly Hills which owns and operates real estate in California. First City Financial also does business in California directly, via its Angeles and First City Industries subsidiaries which are located in California and which engage in both the oil, gas and the real estate syndication and real estate development businesses. Defendants Drexel Burnham and Michael Milken also conduct business in Los Angeles, and Drexel Burnham's Los Angeles office and Michael Milken were involved in the wrongdoing complained of herein. The business conducted by Ashland Oil, the Belzberg Group, including First City Financial, and Drexel Burnham within the State of California are, with respect to each such company, extensive and wide-ranging, substantial, continuous and systematic. The amount in controversy is in excess of the jurisdictional minimum of the Court, and certain aspects of this action are of an equitable nature and thereby subject to the jurisdiction of the Court.

III.

PARTIES

5. Plaintiff Pauline Mickler and Pauline Mickler, Executrix of the Estate of Arthur Mickler, ("Mickler") is a resident and citizen of the Commonwealth of Kentucky and was the owner or representative owner and the beneficial owner of shares of Ashland common stock on the prior to April 1, 1986, and at all times material hereto. Plaintiff Mickler was a shareholder of Ashland at the time the transactions complained of herein took place, and plaintiff Mickler continues to be the owner or representa-

tive owner and the beneficial owner of shares of Ashland common stock.

6. Ashland is named as a nominal defendant in the derivative action in counts one through six herein. Ashland is a corporation organized and existing under the laws of the Commonwealth of Kentucky, having its principle place of business in Kentucky. Ashland is a diversified petroleum refiner, marketer of petroleum products, chemical products, coal, construction products, engages in petroleum production, provides engineering services to the energy and other industries, and designs and manufactures industrial steam generating equipment and utility boilers. Ashland engages in the production of crude oil and natural gas in the United States and in other parts of the world. As of March 31, 1986, Ashland had approximately 31 million shares of common stock outstanding and in excess of 38,000 shareholders of record.

7. The following defendants are referred to collectively as the "Director Defendants" and are sued as defendants and as aiders and abettors and co-conspirators who caused Ashland to use its corporate assets to buy off the Belzbergs so that they could continue to control Ashland and maintain their respective positions of power, prestige and profit with Ashland:

(a) John R. Hall is a resident and citizen of the Commonwealth of Kentucky, and at all relevant times was, Chairman of the Board of Directors, Chief Executive Officer, and a member of the Finance Committee of Ashland;

(b) Robert T. McCowan is a resident and citizen of the Commonwealth of Kentucky, and at all relevant times was, the Vice Chairman of the Board of Directors; Executive Vice President; a director; and a member of its

Benefit Plans, and Manufacturing & Transportation Committees of Ashland;

(c) William R. Seaton is a resident and citizen of the Commonwealth of Kentucky, and at all relevant times was, Vice Chairman of the Board of Directors, Chief Financial Officer, a director, and a member of the Finance Committee of Ashland;

(d) Charles J. Luellen is a resident and citizen of the Commonwealth of Kentucky, and at all relevant times was, Senior Vice President; Group Operating Officer; a director; and a member of the Benefit Plans, Finance, and Manufacturing & Transportation Committees of Ashland;

(e) Samuel C. Butler is a resident and citizen of the State of New York, and at all relevant times was, a director and member of the Finance Committee of Ashland;

(f) Eugene W. Erikson is a resident and citizen of the State of Florida, and at all relevant times was, a director and member of the Finance, Manufacturing & Transportation, and Nominating Committees of Ashland;

(g) James B. Farley is a resident and citizen of the State of New Jersey, and at all relevant times was, a partner and member of the Audit, and Personnel & Compensation Committees of Ashland;

(h) Robert D. Gordon is a resident and citizen of the State of Oklahoma, and at all relevant times was, a director and member of the Benefit Plans, Energy, and Nominating Committees of Ashland;

(i) Walter W. Hillenmeyer, Jr. is a resident and citizen of the Commonwealth of Kentucky, and at all relevant times was, a director and member of the Audit, Benefit Plan, Finance, and Nominating Committees of Ashland;

(j) Don T. McKone is a resident and citizen of the State of Ohio, and at all relevant times was, a director and member of the Benefit Plans Committee of Ashland;

(k) Harold S. Mohler is a resident and citizen of the Commonwealth of Pennsylvania, and at all relevant times was, a director and member of the Audit, Benefit Plans, Manufacturing & Transportation, and Personnel & Compensation Committees of Ashland;

(l) Grover E. Murray is a resident and citizen of the State of Texas, and at all relevant times was, a director and member of the Audit, Energy, and Manufacturing & Transportation Committees of Ashland;

(m) Jane C. Pfeiffer is a resident and citizen of the State of Connecticut, and at all relevant times was, a director and member of the Finance, and Personnel & Compensation Committees of Ashland;

(n) Robert S. Reigeluth is a resident and citizen of the State of Connecticut, and at all relevant times was, a director and member of the Finance, Manufacturing & Transportation, and Nominating Committees of Ashland;

(o) James R. Rinehart is a resident and citizen of the State of Indiana, and at all relevant times was, a director and member of the Audit, Finance, and Manufacturing & Transportation Committees of Ashland;

(p) F. H. Ross, Jr. is a resident and citizen of the State of North Carolina, and at all relevant times was, a director of Ashland;

(q) Robert R. Stobaugh is a resident and citizen of the Commonwealth of Massachusetts, and at all relevant times was, a director and member of the Energy, Finance, Manufacturing & Transportation, and Personnel & Compensation Committees of Ashland;

(r) Richard L. Terrell is a resident and citizen of the State of Florida, and at all relevant times was, a director and member of the Benefit Plans, and Personnel & Compensation Committees of Ashland; and

(s) James W. Vandereer is a resident and citizen of the State of Texas, and at all relevant times was, a director and member of the Audit, and Energy Committees of Ashland.

8. With respect to all matters complained of herein, the Director Defendants have acted in a unified and unitary fashion, unanimously approved the "greenmail" payment to the Belzbergs and none of them has dissented, publicly or privately, from the action taken. Spokesmen for the Director Defendants have repeatedly stated that the action taken with respect to the Belzbergs was proper, justified, and not the result of any improper motive or purpose.

9. The Director Defendants perpetrated, approved, aided and abetted, or conspired in the commission of the wrongs complained of herein, and as a Board unanimously ratified the buy-off of the Belzbergs.

10. By reason of their positions as directors of Ashland and their control of the business and corporate affairs of Ashland, the Director Defendants owed Ashland and its shareholders fiduciary obligations and were and are required to use their ability to control and manage Ashland in a fair, just and equitable manner; to act in furtherance of the best interests of Ashland and its shareholders; to refrain from abusing their positions of control and not to favor their own interests or the interests of any particular shareholders at the expense of Ashland and its shareholders.

11. The following defendants are referred to herein as the "Belzberg Group":

(a) Defendant William Belzberg is a citizen of California and a resident of Beverly Hills, California, a brother of Samuel and Hyman Belzberg, and was at all relevant times a member of the Board of Directors and Vice President of First City Financial Corporation, Ltd. ("First City"); Chairman of the Board of Directors of Far West Financial Corporation of Newport Beach, California; and Chairman of the Board of Directors, President and Chief Executive Officer of First City Properties, Inc. located in Beverly Hills, California;

(b) Defendant Hyman Belzberg, is a resident of Canada and a brother of William and Samuel Belzberg;

(c) Defendant Samuel Belzberg is a resident of Canada and a brother of William and Hyman Belzberg; the Belzberg brothers while pursuing this conduct complained of herein have acted in a cooperative and unified fashion, using one or more of the various business entities they control as the instrumentalities to achieve their ends;

(d) Defendant Marc Belzberg is Vice President of First City Financial and maintains a place of business through First City Financial's office in New York City, New York, and was an active participant in the wrongdoing complained of herein.

(e) Defendant First City is a Canadian corporation with its principal office in Vancouver, British Columbia. First City is a holding investment corporation with financial, manufacturing and real estate subsidiaries throughout Canada and the United States. Among the entities controlled by First City, is Far West Financial Corporation, a large savings and loan located in Newport Beach, California. Collectively, William Belzberg, Hyman

Belzberg and Samuel Belzberg control approximately sixty-eight percent (68%) of the outstanding shares of First City and through First City control Far West Financial Corporation and First City Properties and Industries. The Belzbergs also own a controlling interest in Far West Financial. Defendants First City Financial Corporation, First City Trust Company, Roxboro Investments (1976) Ltd., Bel-Fran Investments Ltd., Bel-Cal Holdings Ltd., Bel-Alta Holdings Ltd. are controlled by corporations or family trusts under the control of William Belzberg, Hyman Belzberg and Samuel Belzberg, and the Belzbergs have dominated, influenced and controlled these defendants, and there has been such a unity of interest, ownership and control between these defendants and the Belzbergs such that the individuality and separateness of these organizations have ceased. The Belzbergs have utilized First City as their instrumentaility for perpetrating the greenmail and other wrongs detailed herein. First City is a highly leveraged corporation with most of its assets located outside of the United States. The Belzbergs utilized First City to attempt to operate beyond the jurisdiction of the American courts and to avoid legal process and redress by victimized corporations and shareholders by the fiction of their Canadian corporation and family trusts. Adherence to the fiction of First City's and the Belzberg Group's separate existences would, under the circumstances, sanction a fraud and promote injustice;

(f) Defendant First City Trust Company is a Canadian company and ninety-eight percent of its outstanding common stock is owned by First City. First City Trust owns and controls some 61,000 of the Ashland shares owned by the Belzbergs; and

(g) Defendants Roxboro Investments (1976) Ltd., Bel-Fran Investments Ltd., Bel-Cal Holdings Ltd., Bel-Alta Holdings Ltd. are corporations controlled by the Belzbergs and through which the Belzberg Group controls First City Financial Corporation Ltd. and First City Trust Company. Roxboro Investments (1976) Ltd., Bel-Fran Investments Ltd., Bel-Cal Holdings Ltd., Bel-Alta Holdings Ltd. were signatories to the buy out agreement complained of herein.

12. The following defendants are referred to herein as the "Drexel Burnham defendants":

(a) Defendant Drexel Burnham, a Delaware corporation, is a firm of investment bankers with its principal office in Los Angeles, California. Drexel Burnham through its Los Angeles office acted as financial advisor to the Belzberg Group in pursuing the course of conduct complained of herein and actively helped the Belzberg Group plan and execute the wrongful transactions complained of herein. Drexel Burnham is a notorious aider and abettor in other "greenmail" activities, and has assisted other corporate raiders in greenmailing a number of companies, including the infamous Steinberg raid on Walt Disney Productions, which produced a huge greenmail payoff to Steinberg from Disney. Drexel Burnham received substantial fees from the Belzberg Group in payment for its services and also received part of the illegal payments complained of herein.

(b) Defendant Michael Milken is a citizen of the State of California and a resident of Los Angeles County. Defendant Milken along with Drexel Burnham aided and abetted the Belzberg Group in its greenmail activities detailed herein.

13. At the time of the wrongs complained of herein, the Belzberg Group, by reason of their ownership, control or beneficial interest in Ashland common stock, were able to dominate and influence the business and corporate affairs of Ashland and thus owed Ashland and its shareholders fiduciary obligations, and were required to use their ability to influence and control Ashland in a fair, just and equitable manner; to act in furtherance of the best interests of Ashland and all of its shareholders; to refrain from abusing their positions of control and not to favor their own interests at the expense of Ashland and its shareholders.

IV.

CONCERTED ACTION, AGENCY AND DOE ALLEGATIONS

14. At certain times mentioned herein, the Belzberg Group, the Drexel Burnham defendants, the Director Defendants and the Doe defendants have pursued a common course of conduct, acted in concert with and conspired with one another, and have aided and abetted one another to accomplish the wrongs complained of.

15. Except as alleged herein, plaintiff is as yet ignorant of the true names and capacities, whether individual, associate, corporate or otherwise, of defendants sued as Does 1 through 500, inclusive, and therefore sue these defendants by such fictitious names. Plaintiff will seek leave of the Court to amend this complaint to allege their true names and capacities when ascertained. Each fictitiously-named defendant aided and abetted or participated with the named defendants in the wrongful acts and course of conduct, otherwise caused the damages and is responsible in some manner for the acts, occurrences and events alleged in this complaint.

V.

DERIVATIVE ACTION ALLEGATIONS

16. Plaintiff brings the first, second, third, fourth, fifth and sixth causes of action asserted herein derivatively in the right and for the benefit of Ashland, and plaintiff will fairly and adequately represent and protect the interests of Ashland and its other shareholders.

17. Plaintiff has made no demand on the present directors of Ashland to institute the derivative actions consolidated herewith because any demand was unnecessary and such demand would have been futile and a useless act for at least the following reasons:

(a) All of the directors of Ashland approved the buy out of the Belzberg Group whereby Ashland purchased securities from the Belzburgs and promised (explicitly or implicitly) not to sue or pursue them legally, and thus are incapable of exercising independent objective judgment in deciding whether to bring this action against the Belzberg Group or the Drexel Burnham defendants;

(b) All of the directors actively participated in, approved or permitted the wrongs alleged herein including unanimously ratifying management's action in making the Belzberg buy out, the open market stock repurchases by Ashland and the placing of stock in the company controlled ESOP, and in their efforts to conceal the adverse impact of those wrongs from Ashland's other shareholders;

(c) The acts complained of herein were illegal and the funds expended by Ashland constituted a waste of Ashland's assets, and thus these acts were incapable of ratification by the Board of Directors or Ashland's shareholders;

(d) All of the then-current directors of Ashland were under the control and domination of the principal beneficiaries of the alleged wrongdoing, and thus were incapable of exercising independent objective judgment in deciding whether to bring this action;

(e) In order to bring these suits, the directors would have had to sue themselves, which they will not do;

(f) All of the directors are interested in the transactions complained of and have benefited personally from those transactions, which transactions were designed to entrench the directors in their positions of power, prestige and profit, to assure the continuance of their lucrative perquisites and remuneration either as directors and/or officers of Ashland and to prevent control of Ashland from passing to independent hands which would result in the disclosure of the truth concerning unlawful payments to officials in Oman and the pursuit of claims based thereon on behalf of Ashland against them. A demand would also have been futile since certain of the directors were seeking to maintain their positions of employment with Ashland and dominated the company, its management and the Board of Directors of Ashland;

(g) The directors of Ashland have publicly endorsed and defended the actions complained of herein and have specifically denied that the buy out of the Belzberg Group was a greenmail payment or in any way improper or illegal and hence have indicated they will not sue the Belzbergs or the Drexel Burnham defendants; and

(h) A true and correct copy of this complaint was delivered to Ashland prior to its filing by Federal Express delivery to its corporate secretary at its corporate headquarters in Russell, Kentucky.

VI.

CLASS ACTION ALLEGATIONS

18. Plaintiff brings the seventh, eighth, ninth and tenth causes of action asserted herein individually and on behalf of all persons similarly situated. The class which plaintiff seeks to represent is composed of all persons who owned Ashland common stock on April 1, 1986, when Ashland's agreement to buy back/purchase the Ashland stock held by the Belzberg Group (the "Buy Back Agreement") was publicly announced. Excluded from the Class are the defendants, the subsidiaries and affiliates of each of the corporte defendants, the members and members of the immediate families of the Belzberg Group and each of the Director Defendants, the legal representatives, heirs, successors or assigns of any of the aforementioned, and any person or entity controlled by any of the aforementioned on April 1, 1986. Plaintiff is a member of the Class.

19. The members of the Class are so numerous that joinder of all members is impracticable. There are approximately 38,000 Ashland common shareholders and over 31 million shares of Ashland common stock outstanding. The disposition of their claims in a class action is of benefit to the parties and the Court. The record owners of Ashland common stock and the members of the proposed Class are easily determined from the stock transfer journals maintained by Ashland or its agents. As of April 23, 1986, there were approximately 1,800 registered Ashland shareholders in California, and an additional and large number of beneficial owners of Ashland stock reside in California.

20. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. Questions of fact common to the Class include, *inter alia:*

(a) Whether the Director Defendants breached their fiduciary duties by taking the anti-takeover steps complained of herein when they caused Ashland to buy back the Belzberg Group's Ashland shares at a price in excess of that at which it had been trading prior to the Belzberg Group's disclosure of their interest and takeover plans and which guaranteed a large profit to the Belzberg Group;

(b) Whether the Director Defendants engaged in a plan and scheme to entrench themselves in their positions of management to maintain their lucrative remuneration and perquisites from Ashland; and whether the Belzberg Group engaged in a preconceived scheme to coerce the payment of an illegal premium for Ashland's common stock held by the Belzberg Group while violating their fiduciary duties to Ashland and its other shareholders;

(c) Whether the Director Defendants are guilty of mismanagement, whether they were negligent, and whether they abused or conspired to abuse their control of Ashland and/or violate their duties to Ashland and its other shareholders;

(d) Whether the Belzberg Group, aided and abetted by the Drexel Burnham defendants, engaged in a scheme to coerce an illegal payment for Ashland's common stock held by the Belzberg Group while engaging in deceit and/or violating their fudiciary duties to Ashland and its other shareholders;

(e) Whether the members of the Belzberg Group, aided and abetted by the Drexel Burnham defendants, breached their fiduciary duties by using their power, influence and shareholdings to cause a buy-back of the Belzberg Group's Ashland shares on terms discriminately

favorable to the Belzberg Group and detrimental to the other Ashland shareholders, as alleged herein;

(f) Whether the Belzberg Group, aided and abetted by the Drexel Burnham defendants, breached their fiduciary duties and aided and abetted the Director Defendants in breaching their fiduciary duties to Ashland's shareholders; the propriety, fairness and legality of the transactions attacked in this action; the duties owed by the Belzberg Group to members of the Class thereof; the resulting liabilities of the Belzberg Group and the proper remedy;

21. Plaintiff's claims are typical of the claims of the members of the Class, and said plaintiff will adequately represent and protect the interests of the Class. Plaintiff has retained counsel who are competent and experienced in derivative and class action litigation and who will provide adequate representation and protect the interests of the Class.

22. The likelihood of individual class members prosecuting separate individual actions is remote due to the relatively small loss suffered by each class member as compared to the burden and expense of prosecuting litigation of this nature and magnitude. Absent a class action, the defendants are likely to retain the benefits of their wrongdoing and class members are unlikely to recover their losses.

VII.

BACKGROUND

23. During recent years and until 1985, Ashland was plagued by declining earnings, due in substantial part to its divestiture of major portions of its petroleum properties and its concentration in the refining segment of the

energy industry. During Ashland's 1983 fiscal year ending September 30, 1983, its net earnings were $2.23 per share, and for fiscal year 1984, it experienced a loss of $7.40 per share. During this time, its book value declined from $39.27 in 1983 per share to $30.20 per share in 1984.

24. In 1985, Ashland experienced a substantial turnabout in its earnings and financial performance. As a consequence of the drop in crude oil prices, Ashland was able to purchase low price crude stock thus increasing the profit margins on its refinery operations. For fiscal year 1985, Ashland reported earnings of $4.12 per share and the book value of its common stock rose to $32.74 per share.

25. During 1985, the Director Defendants became fearful that the turnabout in the company's profits and prospects would prompt a takeover or merger bid by another person or entity, and that they would be ousted from their respective positions of power, prestige and profit as Ashland directors. In addition, the Ashland Board has been struggling for several years to prevent the disclosure of the true facts and circumstances regarding Ashland's payment of $1.35 million to Mont d'Or, a Liechtenstein concern and its loss of $25 million for a 75% stake in a Zimbabwe chromium mine, which were in fact payments intended for officials in Oman as a bribe for certain oil purchases and constituted a violation of the Foreign Corrupt Practices Act and subsequent acts to cover up these payments and avoid prosecution therefore which they can only achieve by maintaining control of Ashland.

26. The Director Defendants, fearful that they would lose their positions of power, prestige and profit at Ashland and to prevent disclosure of information regarding Ashland's illegal payments of a takeover bid was success-

ful, embarked upon a scheme and plan to manipulate the corporate machinery of Ashland so as to make it extremely difficult for any such takeover or merger bid to succeed absent their consent and active support.

27. In furtherance of their scheme to discourage any takeover bids, the Director Defendants recently caused Ashland to change its corporate charter to make takeover attempts more difficult. The Director Defendants, among other acts, caused the company to require staggered terms for its Board of Directors, increased the percentage of shareholder votes necessary to remove any directors, and gave the directors greater ability to effect shareholder actions by, *inter alia*, controlling special shareholder meetings. In addition, on or about May 16, 1986, it was announced that the Director Defendants had recently adopted a "poison pill" which provides Ashland shareholders with preference stock equal to ten votes of common stock per preference share and which is exercisable only if any person or group acquires 20% or more of Ashland's common stock or announces a tender offer for 30% or more of Ashland's common stock outstanding.

28. The above anti-takeover measures were proposed, endorsed, pursued or enacted by the Director Defendants for no valid corporate purpose, but rather for the wrongful purpose of preserving themselves in office at great cost to the shareholders, and continuing to reap the substantial financial and other rewards which they had voted for themselves and for each other and to permit them to cover up and avoid prosecution for their prior violations of law.

29. As a consequence of the above anti-takeover maneuvers, Ashland became a less attractive acquisition target and the market price of Ashland's common stock remained depressed in relation to its earnings and profits

and to the true value of its underlying oil and gas refining capacity and other assets.

VIII.

THE BELZBERG GROUP'S PURCHASE OFFER

30. From February 11, 1986 through February 28, 1986, the Belzberg Group, primarily through First City, acquired 1.4 million shares of Ashland common stock at prices ranging from $38½ to $45 per share. In addition, the Belzberg Group, primarily through First City, obtained options to purchase an additional 1.2 million shares of Ashland stock for approximately $48.00 per share.

31. After the initial acquisition of Ashland stock, the Belzberg Group caused analysts from First City to visit Ashland and have discussions with Ashland regarding Ashland's operations and the Belzberg Group's intentions. As a result thereof, and other actions of the Belzberg Group, after the Belzberg Group's acquisitions of Ashland stock had begun, and in part through the actions of the Drexel Burnham defendants and the Director Defendants, information began circulating in the investment community that Ashland could be the target of a takeover attempt by an investor or group of investors who would offer to pay for Ashland common stock a price more in line with the substantial value of Ashland's underlying assets and earnings prospects, and substantially over the then current market price. As a consequence, Ashland's common stock increased in value to approximately $48 per share as of March 24, 1986.

32. On March 25, 1986, Ashland, through the Director Defendants and with the Belzberg Group's knowledge, publicly reported that the Belzberg Group had purchased

between 8 and 9 percent of Ashland's outstanding common stock. As a consequence of the disclosure regarding the Belzberg Group's purchase of Ashland stock, the price jumped $3.75 per share to $52 per share on the New York Stock Exchange on March 25, 1986.

33. On March 26, 1986, the Belzberg Group, aided and abetted by Drexel Burnham, filed a Schedule 13D with the Securities and Exchange Commission in which it disclosed that it, primarily through First City, owned or beneficially owned 9.2% of Ashland's outstanding common stock. Attached to the Schedule 13D was a letter that had been sent by defendant Samuel Belzberg to defendant John R. Hall on March 25, 1986, in which the Belzberg Group represented:

> [W]e are prepared today to enter into an agreement providing for the acquisition of 100 percent of the stock of Ashland by First City at a price of $60.00 per share of common stock. If you enter into good faith negotiations with us, we believe that working together we can negotiate a higher price for Ashland's shareholders.

The letter further stated that "[a] failure to respond by 5:00 p.m. on Monday, March 31, 1986, will be treated as a rejection of our offer."

34. On March 28, 1986, the Belzberg Group, aided and abetted by Drexel Burnham, filed a Hart-Scott-Rodino disclosure document with the Justice Department and the Federal Trade Commission representing its intent to acquire Ashland and requesting an opinion as to the antitrust implications of its professed acquisition plans.

35. The public announcements by the Belzberg Group and the Director Defendants were false and misleading.

IX.

THE BUY BACK AGREEMENT

36. By March 31, 1986, the Director Defendants failed to make any public response to the Belzberg Group's purchase offer. On April 1, 1986, Ashland announced that it had agreed to purchase all of the approximately 2.6 million shares of Ashland common stock owned or controlled by the Belzberg Group for $51 per share, providing them a profit of approximately $15.6 million over the prices paid by the Belzberg Group for its Ashland common stock, and obtained an agreement by First City and the Belzberg Group not to purchase any voting shares in Ashland for the next ten years. The agreement was procured in part by an opinion letter provided to the Belzberg Group by Drexel Burnham in which Drexel Burnham falsely or negligently advised of alleged difficulties relating, *inter alia*, to the effect Kentucky's anti-takeover statute would have on the Belzberg Group's publicly proclaimed plan to acquire Ashland. The representations in the Drexel Burnham opinion were not true, and Drexel Burnham knew, or in the exercise of reasonable and ordinary care would have known, that the representations were not true in that the Kentucky anti-takeover statute was constitutionally infirm.

37. The per share price called for in the Buy Back Agreement constituted a substantial premium over and above both the acquisition cost of the Belzberg Group's Ashland stock and the market price for the stock prior to the unlawful influence by the Belzbergs' manipulative activities, and reflected the increase in the price for Ashland stock that had occurred as a consequence of the Belzberg Group's putting Ashland "into play" and its later publicly declared intent to purchase 100% of Ashland's stock for at least $60.00 per share. This premium

was extracted by the Belzberg Group using its power, influence and shareholdings and for the private sole benefit of the Belzberg Group and the Drexel Burnham defendants and was paid from Ashland's assets at the direction of the Directors to protect their own positions, despite their respective fiduciary obligations to Ashland and its other shareholders, and constitutes an illegal usurpation and waste of corporate assets and preference of one shareholder to the exclusion and detriment to the interests of the other Ashland shareholders.

38. On April 2, 1986, the Belzberg Group filed Amendment No. 1 to its Schedule 13D in which it disclosed the terms of the Buy Back Agreement. Under the terms of the Buy Back Agreement, Ashland purported to release the Belzberg Group from any liability arising out of the buy back transaction. The Buy Back Agreement was entered into by defendants for no valid or justifiable purpose, and was consummated only to further the selfish and personal interests of the Director Defendants to cement their control over Ashland and to maintain their lucrative and prestigious corporate positions, to further the interests of the Belzberg Group by extorting the greenmail payoff from Ashland, and to further the interests of Drexel Burnham by the substantial payments for its services in helping consummate the Buy Back Agreement. Such actions were in breach of defendants' respective fiduciary duties to Ashland and the Class and caused substantial injury to both Ashland and the Class.

39. As a part of the Buy Back Agreement, the Belzberg Group, the Drexel Burnham defendants and the Director Defendants conspired and cooperated to structure the transaction in a fashion that would serve each of their illegal aims while supporting the market price of Ashland common stock thus concealing the harm inflicted

on Ashland and its shareholders by the buy out. To their end the Belzberg Group and the Director Defendants agreed that at the time the buy out of the Belzberg Group was revealed, Ashland's directors would also announce that they would cause the corporation to purchase up to 7.5 million shares of Ashland's common stock (23% of its outstanding stock) at market prices and would issue 5.3 million new shares to an Ashland employee stock ownership plan which the directors control, thus making it virtually impossible for anyone who desires to try to take over Ashland or offer its shareholders a higher price to obtain enough stock to accomplish this end. The 5.3 million shares in the ESOP together with other shares the Board actively controls gives the Ashland directors the power to veto any merger or acquisition of the company via the anti-takeover measures they implemented and thus has given them complete control of the company. Subsequently, the Ashland Board has in fact used corporate funds to repurchase large amounts of Ashland common stock on the open market, in part to inflate the price of the stock and cover up the harm their collusion with the Belzbergs has actually inflicted on Ashland and its other shareholders.

40. In order to obtain the monies necessary to pay off the Belzberg Group and fund the open market stock repurchase to cement their control of Ashland, the Director Defendants have utilized and will utilize Ashland's corporate assets for their own benefit, adversely impacting Ashland's cash reserves and thus harming Ashland's financial condition. Within 24 hours of the announcement of the pay off of the Belzberg Group and the stock repurchase program, Ashland's credit rating was reduced by the national credit rating agencies and it was placed on "the Credit Watch list with negative implications."

41. As a proximate result of the wrongdoing of the defendants Ashland has been substantially injured through the payout of approximately $133 million in its valuable assets and by its placement on "the credit watch list with negative implications," and plaintiff and the other members of the Class have been substantially injured in that they have been saddled with stock in a corporation that has paid out $133 million in its valuable assets, that is currently in a credit watch classification, and which has become a less attractive and viable candidate for takeover by a purchaser willing to pay a price more in line with the true value of the company as a consequence of the anti-takeover provisions enacted by the Director Defendants including the most recent poison pill preference stock tactic.

42. The Belzberg Group's greenmail scheme and the greenmail payoff by the Director Defendants was illegal, a waste and usurpation of Ashland's valuable assets, and was achieved through a breach of their respective fiduciary duties by the Belzberg Group and the Director Defendants to Ashland and the other shareholders.

43. Plaintiff and the members of the Class have no adequate remedy at law.

FIRST CAUSE OF ACTION

(Derivative Action for Intentional Breach of Fiduciary Duty)

44. Plaintiff incorporates by reference paragraphs 1 through 43 above.

45. Aided and abetted by the Belzberg Group and the Drexel Burnham defendants, the Director Defendants engaged in the aforesaid conduct in intentional breach

and/or reckless disregard of their fiduciary duties to Ashland.

46. Aided and abetted by the Drexel Burnham defendants and the Director Defendants, the Belzberg Group engaged in the aforesaid conduct in intentional and/or reckless breach of their fiduciary duties to Ashland.

47. Defendants conspired to abuse, and did abuse, the control and power reposed in the Belzberg Group and the Director Defendants by virtue of their elected positions, their stock ownership, and, in the case of the Belzberg Group, their status as a controlling or dominant shareholder of Ashland.

48. As a proximate result of the matters complained of herein, defendants have unjustly benefitted and will continue to unjustly benefit unless enjoined, and Ashland has sustained damages thereby.

49. Defendants, and each of them, did the things alleged in this complaint with the intent to injure Ashland and these acts were done maliciously and oppressively and with wanton disregard for the rights of Ashland and in disregard for their fiduciary obligations to Ashland. By reason of the foregoing, defendants are each jointly and severally liable to Ashland for all loss and damage that it has suffered and will suffer resulting from the matters set forth herein and for exemplary and punitive damages.

SECOND CAUSE OF ACTION
(Derivative Action for Negligent Breach of Fiduciary Duty)

50. Plaintiff incorporates by reference paragraphs 1 through 43 above.

51. Aided and abetted by the Belzberg Group and the Drexel Burnham defendants, the Director Defendants engaged in the aforesaid conduct without exercising the reasonable and ordinary care which directors and officers owe to a corporation and its shareholders, and thereby breached their fiduciary duties to Ashland.

52. Aided and abetted by the Drexel Burnham defendants and the Director Defendants, the Belzberg Group engaged in the aforesaid conduct without exercising the reasonable and ordinary care owed to corporations by controlling or dominant shareholders and thereby breached their fiduciary duties to Ashland.

53. As a proximate result of the matters complained of herein, defendants have unjustly benefitted and will continue to unjustly benefit unless enjoined, and Ashland has sustained damages thereby.

54. By reason of the foregoing, defendants are each jointly and severally liable to Ashland for all loss and damage that it has suffered and will suffer resulting from the matters set forth herein.

THIRD CAUSE OF ACTION
(Derivative Action for Abuse of Control)

55. Plaintiff incorporates by reference paragraphs 1 through 43 above.

56. Aided and abetted by the Belzberg Group and Drexel Burnham, the foregoing conduct by the Director Defendants amounted to an abuse of their abilities to control Ashland by causing or permitting Ashland to enact the anti-takeover provisions, including the recently enacted poison pill preference stock, to enter into the Buy Back Agreement and to make the illegal greenmail pay-

ment, and to pursue additional purchases of Ashland stock to the detriment of Ashland as alleged above.

57. Aided and abetted by the Drexel Burnham defendants and the Director Defendants, the foregoing conduct by the Belzberg Group amounted to an abuse of their abilities to control Ashland by usurping Ashland's valuable assets through the greenmail sale of its stock pursuant to the Buy Back Agreement.

58. As a result, Ashland has been damaged and will continue to be damaged unless defendants are enjoined.

59. By reason of the foregoing, defendants are each jointly and severally liable to Ashland for all loss and damage that it has suffered and will suffer resulting from the matters set forth herein.

FOURTH CAUSE OF ACTION
(Derivative Action for Unjust Enrichment)

60. Plaintiff incorporates by reference paragraphs 1 through 43 above.

61. As a proximate result of the tortious conduct described above, the Belzberg Group and the Drexel Burnham defendants, aided and abetted by the Director Defendants, have been unjustly enriched at Ashland's expense by their receipt of the proceeds of the illegal and wrongful Buy Back Agreement.

62. The Belzberg Group and the Drexel Burnham defendants should be required to disgorge the respective payments and gains which they unjustly obtained at the expense of Ashland, and a constructive trust for the benefit of Ashland should be imposed thereon, and the Director Defendants should be held liable for their con-

duct in aiding and abetting the Belzberg Group and the Drexel Burnham defendants.

FIFTH CAUSE OF ACTION
(Derivative Action for Waste
and Usurpation of Corporate Assets)

63. Plaintiff incorporates by reference paragraphs 1 through 43 above.

64. Aided and abetted by the Belzberg Group and the Drexel Burnham defendants, the Director Defendants engaged in a waste and usurpation of the valuable assets of Ashland through payment of approximately $133 million under the Buy Back Agreement, resulting, *inter alia,* in Ashland being placed in a credit watch classification and in a downgrading of Ashland's commercial paper which will make it more costly for Ashland to borrow in the commercial markets. The foregoing actions were taken by the Director Defendants for the purpose of maintaining their lucrative and prestigious positions with Ashland and without concern for their fiduciary obligations to Ashland.

65. Aided and abetted by the Drexel Burnham defendants and the Director Defendants, the Belzberg Group engaged in a waste and usurpation of the valuable assets of Ashland through receipt of the approximately $133 million greenmail payment from Ashland under the Buy Back Agreement, resulting, *inter alia,* in Ashland being placed in a credit watch classification and in a downgrading of Ashland's commercial paper which will make it more costly for Ashland to borrow in the commercial markets. The foregoing actions were taken by the Belzberg Group for the sole purpose of enriching themselves and in breach of their duties as dominant or controlling shareholders of Ashland.

66. By reason of the foregoing, defendants are each jointly and severally liable to Ashland for all loss and damage that it has suffered and will suffer resulting from the matters set forth herein.

SIXTH CAUSE OF ACTION

(Derivative Action for Unfair Trade Practice — Business and Professions Code § 17200)

67. Plaintiff incorporates by reference paragraphs 1 through 43 above.

68. Aided and abetted by the Belzberg Group and the Drexel Burnham defendants, the Director Defendants caused Ashland to distribute Ashland's assets to buy back all of the Ashland common shares held by the Belzberg Group at a premium and on terms unfair to Ashland and its other shareholders. The distribution was unfair to Ashland and was in preference to the Belzberg Group's shares over those of plaintiff and other Ashland shareholders.

69. Aided and abetted by the Director Defendants and the Drexel Burnham defendants, the Belzberg Group has engaged in a pattern of unfair business practices, including its misrepresentations and nondisclosures regarding its purchase and sale of Ashland common stock and its greenmailing of Ashland by which it obtained an unfair distribution of Ashland's assets.

70. The Belzberg Group's actions in greenmailing Ashland and the distribution of Ashland assets to the Belzberg Group as complained of herein constitutes an unfair trade practice. The unfair preferential distribution must be set aside through rescission of the Buy Back

Agreement, return of the monetary consideration to Ashland, and return of the shares to the Belzberg Group.

SEVENTH CAUSE OF ACTION
(Class Action for Intentional
Breach of Fiduciary Duty)

71. Plaintiff incorporates by reference paragraphs 1 through 43 above.

72. Aided and abetted by the Belzberg Group and the Drexel Burnham defendants, the Director Defendants engaged in the aforesaid conduct in intentional breach and/or reckless disregard of their fiduciary duties to plaintiff and the members of the Class.

73. Aided and abetted by the Drexel Burnham defendants and the Director Defendants, the Belzberg Group engaged in the aforesaid conduct in intentional and/or reckless breach of their fiduciary duties to plaintiff and the members of the Class.

74. Defendants, at the time they agreed to enter into the Buy Back Agreement, knew that the market price of Ashland stock reflected both the intrinsic value of Ashland and a premium which resulted from market expectations that the Belzberg Group's efforts to acquire 100 percent (100%) of Ashland's stock would produce greater returns for investors. Defendants were aware, therefore, that if they breached their fiduciary duties to the shareholders described above, it would have an adverse effect on the value of the other Ashland shareholders' holdings on a long term basis.

75. In fact, as a direct, proximate and foreseeable result of the defendants' actions described above, plaintiff and the other members of the class were saddled with stock in a corporation that has paid out $133 million in its

valuable assets, that is currently on a Credit Watch list, and which has become a less viable candidate for takeover by a purchaser willing to pay a price more in line with the true value of the company as a consequence of the anti-takeover actions pursued by the Director Defendants including the most recent poison pill preference stock tactic.

76. A a proximate result, the plaintiff and other members of the Class have been substantially injured. This injury is separate and distinct from the injury suffered by Ashland as a result of the wrongful conduct alleged above.

77. Defendants, and each of them, did the things alleged in this complaint with the intent to injure plaintiff and other members of the Class and these acts were done maliciously and oppressively and with wanton disregard for the rights of plaintiff and the other members of the Class. By reason of those acts, plaintiff demands exemplary and punitive damages against each defendant.

78. Plaintiff and the members of the Class have no adequate remedy at law.

EIGHTH CAUSE OF ACTION
(Class Action for Negligent Breach of Fiduciary Duty)

79. Plaintiff incorporates by reference paragraphs 1 through 43 above.

80. Aided and abetted by the Belzberg Group and the Drexel Burnham defendants, the Director Defendants engaged in the aforesaid conduct without exercising the reasonable and ordinary care which directors and officers owe to its shareholders, and thereby breached their fiduciary duties to plaintiff and other members of the Class.

81. Aided and abetted by the Drexel Burnham defendants and the Director Defendants, the Belzberg Group engaged in the aforesaid conduct without exercising the reasonable and ordinary care owed to shareholders by controlling or dominant shareholders.

82. Defendants, at the time they entered into the Buy Back Agreement, knew or should have known that the market price of Ashland stock at the time reflected both the intrinsic value of Ashland and a premium which resulted from market expectations that the Belzberg Group's efforts to acquire 100 percent (100%) of Ashland's stock would produce greater value returns for investors.

83. Defendants were aware, or should have been aware, that if they breached their duty to the shareholders described above, it would have an adverse effect on the value of the other shareholders' Ashland investments.

84. In fact, as a direct, proximate and foreseeable result of the defendants' actions described above, plaintiff and the other members of the class were saddled with stock in a corporation that has paid out $133 million in its valuable assets, that is currently on a Credit Watch list, and which has become a less viable candidate for takeover by a purchaser willing to pay a price more in line with the true value of the company as a consequence of the anti-takeover actions pursued by the Director Defendants including the most recent poison pill preference stock.

85. As a proximate result, the plaintiff and other members of the Class have been substantially injured. This injury is separate and distinct from the injury suffered by Ashland as a result of the wrongful conduct alleged above.

86. Defendants did the things alleged in the complaint without exercising the reasonable and ordinary care owed by dominant or controlling shareholders, and plaintiff and the other members of the Class have been injured thereby.

87. Plaintiff and the members of the Class have no adequate remedy at law.

NINTH CAUSE OF ACTION

(Class Action for Abuse of Control)

88. Plaintiff incorporates by reference paragraphs 1 through 43 above.

89. The Director Defendants and the Belzberg Group owed duties as controlling persons and/or as controlling or dominate shareholders to plaintiff and the other members of the Class not to use their positions of control of Ashland for their own personal interests and contrary to the interests of Ashland's remaining shareholders.

90. Aided and abetted by the Belzberg Group and the Drexel Burnham defendants, the foregoing conduct by the Director Defendants amounted to an abuse of their abilities to control Ashland in violation of their obligations to plaintiff and the other members of the Class.

91. Aided and abetted by the Drexel Burnham defendants and the Director Defendants, the foregoing conduct by the Belzberg Group amounted to an abuse of their positions as controlling and dominant shareholders of Ashland in violation of their obligations to plaintiff and the other members of the Class.

92. As a result, plaintiff and the other members of the Class have been damaged in that the value of their investment in Ashland has decreased by reason of the payout of $133 million in assets, Ashland has been placed

on a Credit Watch list, and the anti-takeover provisions including the most recent poison pill preference stock tactic make Ashland an unattractive takeover candidate, and plaintiff and the other members of the class will continue to be damaged unless defendants are enjoined. Defendants are each jointly and severally liable to plaintiff and the other members of the Class for all loss and damage they have suffered resulting from the matters set forth herein.

93. Plaintiff and the members of the Class have no adquate remedy at law.

TENTH CAUSE OF ACTION
(Class Action for Payment of Illegal Premiums)

94. Plaintiff incorporates by reference paragraphs 1 through 43 above.

95. As a consequence of the foregoing conduct, the Director Defendants and the Belzberg Group, aided and abetted by the Drexel Burnham defendants caused the Belzberg Group to receive a payment of $133 million which total payment includes a premium of $15.6 million to the Belzberg Group.

96. The premium paid to the Belzberg Group for its shares of Ashland as part of the Buy Back Agreement was intended by defendants as a preference for one group of shareholders to the exclusion of other shareholders, and to entrench the then-current Ashland management in their positions of power and perquisites at Ashland.

97. Defendants knew or should have known that the premium payment would decrease the intrinsic value of Ashland common stock, would deprive the company of value and would harm all the other shareholders of Ashland.

98. As a direct and proximate result of defendants' conduct, the plaintiffs and the members of the class were damaged in an amount equal to their proportional shares of the premium paid to the Belzberg Group.

99. Plaintiff and the members of the Class have no adequate remedy at law.

WHEREFORE, plaintiff seeks judgment, jointly and severally, against all defendants as follows:

Class Actions:

A. Declaring Counts 7, 8, 9 and 10 of this action to be a class action pursuant to section 382 of the California Code of Civil Procedure.

B. For exemplary and punitive damages.

C. Directing all defendants, and each of them, to account to the plaintiff and the other members of the Class for all damages and injuries sustained and to be sustained as a result of the acts and transactions alleged herein.

D. Awarding reasonable fees to class plaintiffs' attorneys and experts, plus expenses incurred in the prosecution of this action, and directing defendants to pay all court costs.

E. Awarding pre-judgment and post-judgment interest on all amounts awarded to the maximum extent permitted by law or in equity.

F. Awarding preliminary and permanent injunctive relief enjoining the consummation of the Buy Back Agreement and preventing the further dissipation of Ashland assets and imposing a constructive trust upon the Belzberg Group of defendants, including First City Financial, for all funds received from Ashland, and requir-

ing the Belzberg Group to place its greenmail profits in a separate trust account.

G. Granting such other and further relief as may be just and proper.

Derivative Actions:

A. Enjoining, preliminarily and permanently, the Buy Back Agreement; declaring the Buy Back Agreement null and void; and ordering the Buy Back Agreement to be rescinded and unwound to the extent, if at all, it has been effectuated.

B. Establishing a constructive trust of any monies received by the Belzberg Group, and their affiliates and related persons, from Ashland in connection with the Buy Back agreement to be held for the benefit of Ashland and its shareholders.

C. Awarding damages against all defendants in an amount to be proven at trial.

D. For exemplary and punitive damages.

E. Directing that all defendants account for all damages caused by them and all profits and special benefits and unjust enrichment they have obtained as a result of their unlawful conduct.

F. Awarding pre-judgment and post-judgment interest on all amounts awarded to the maximum extent permitted by law or in equity.

G. Awarding to the derivative plaintiff the costs and disbursements of this action, including a reasonable allowance for the fees and expenses of derivative plaintiff's attorneys and experts.

H. Granting such other and further relief as may be just and proper.

Dated: May 23, 1986

MILBERG WEISS BERSHAD
SPECTHRIE & LERACH
WILLIAM S. LERACH
EUGENE MIKOLAJCZYK

By: WILLIAM S. LERACH
William S. Lerach

2000 Central Savings Tower
225 Broadway
San Diego, California 92101
Telephone: (619) 231-1058

DAVID B. GOLD, A PROFESSIONAL
LAW CORPORATION
DAVID B. GOLD
120 Montgomery Street,
Suite 650
San Francisco, California 94104
Telephone: (415) 981-2440

BERGER & MONTAGUE, P.C.
MERRILL G. DAVIDOFF
SHERRIE R. SAVETT
1622 Locust Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 875-3000

LYNCH, SHERMAN & COX
ERWIN A. SHERMAN
1800 Meidinger Tower
Louisville, Kentucky 40202
Telephone: (502) 589-4215

Attorneys for Plaintiff

JURY DEMAND

Plaintiff demands a trial by jury.

Dated: May 23, 1986

MILBERG WEISS BERSHAD
SPECTHRIE & LERACH
WILLIAM S. LERACH
EUGENE MIKOLAJCZYK

By: WILLIAM S. LERACH
William S. Lerach

2000 Central Savings Tower
225 Broadway
San Diego, California 92101
Telephone: (619) 231-1058

DAVID B. GOLD, A PROFESSIONAL
LAW CORPORATION
DAVID B. GOLD
120 Montgomery Street,
Suite 650
San Francisco, California 94104
Telephone: (415) 981-2440

BERGER & MONTAGUE, P.C.
MERRILL G. DAVIDOFF
SHERRIE R. SAVETT
1622 Locust Street
Philadelphia, Pennsylvania 19103
Telephone: (215) 875-3000

LYNCH, SHERMAN & COX
ERWIN A. SHERMAN
1800 Meidinger Tower
Louisville, Kentucky 40202
Telephone: (502) 589-4215

Attorneys for Plaintiff

VERIFICATION OF COMPLAINT

I, WILLIAM S. LERACH, declare:

1. I am one of the attorneys for the named plaintiff in the foregoing action.

2. I make this Declaration as Verification because my client, the named plaintiff, is absent from and does not reside in San Diego County, California where I maintain my office.

3. I have read the foregoing complaint, and am informed and believe the matters therein to be true and on that ground allege that the matters stated therein are true to the best of my knowledge, information and belief based on my investigation.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of May, 1986, in San Diego, California.

WILLIAM S. LERACH

UNITED STATED DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 86-2465-DT (Px)

A. JACQUES LOU,
Plaintiff,

vs.

WILLIAM BELZBERG, *et al.*,
Defendants,

ASHLAND OIL, INC.,
Nominal Defendant.

ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION; TEMPORARY RESTRAINING ORDER

DATE: JUNE 3, 1986
TIME: 9:30
COURTROOM: JUDGE TEVRIZIAN

ROBERT S. WARREN
PHILLIP L. BOSL
ROBERT H. FAIRBANK
SCOTT A. EDELMAN
GIBSON DUNN & CRUTCHER
333 South Grand Aveneue
Los Angeles, California 90071
(213) 229-7000

RICHARD E. NOLAN
WILLIAM L. ROSOFF
DANIEL L. BROCKETT
DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005
(213) 530-4000

Attorneys for Defendant
WILLIAM BELZBERG

Upon reading the application of defendant William Belzberg for an Order to Show Cause re preliminary injunction and a Temporary Restraining Order, and the Memorandum of Points and Authorities and Declaration of Robert S. Warren submitted therewith, and it appearing to the Court from the Application and supporting documents that this is a proper instance for, and good cause exists for, the issuance of an order to show cause re preliminary injunction and a temporary restraining order, and that great and irreparable injury would result to the administration of justice and to defendant William Belzberg and the other defendants in this action before the matter could be heard on motion, in that counsel of record for plaintiff in this action and certain other counsel have filed a second action in the Superior Court of California, County of Los Angeles, entitled *Pauline Mickler v. William Belzberg, et al.*, No. CA 000983 (the "Second State Action"), in which the plaintiff purports to be suing on behalf of the same derivative and class claimants involved in this federal action and in which relief, including preliminary injunctive relief, is sought against, among others, the same defendants as are involved in this federal action based on the identical transaction involved in this federal action;

ORDER TO SHOW CAUSE

1. IT IS HEREBY ORDERED that the plaintiff in the Second State Action, Pauline Mickler, and her attorneys are hereby ordered to appear before this Court, the Honorable Dickran Tevrizian, Judge Presiding, located in the United States Courthouse at 312 North Spring Street, Los Angeles, California, on June 3, 1986, at 9:30 AM, then and there to show cause, if any there may be, why a preliminary injunction should not be entered enjoining

and restraining Pauline Mickler, William S. Lerach, Eugene Mikolajczyk, Milberg Weiss Bershad Specthrie & Lerach, David B. Gold, David B. Gold, A Professional Law Corporation, Erwin A. Sherman, Lynch, Sherman & Cox, Merrill G. Davidoff, Sherrie R. Savett, Berger & Montague, P.C., and their agents, servants, employees and all persons, corporations, associations and others acting in concert or participation with them from further prosecuting, or causing to be prosecuted, directly or indirectly, the Second State Action or any other action (except this federal action) on behalf of Ashland Oil, Inc., or any class of its shareholders in any way involving the subject matter or transaction involved in this federal action.

2. IT IS FURTHER ORDERED that copies of defendant William Belzberg's Application for Order to Show Cause re Preliminary Injunction and Temporary Restraining Order, the papers in support thereof, and this Order shall be served on Pauline Mickler by personal delivery to the law firm of Milberg Weiss Bershad Specthrie & Lerach not later than May 29, 1986; provided, however, that defendant William Belzberg shall not be precluded hereby from serving and filing additional or supplemental papers prior to the hearing.

3. IT IS FURTHER ORDERED that Pauline Mickler shall file papers, if any, in opposition to the injunctive relief requested by defendant William Belzberg not later than June 2, 1986, 10:00 AM and shall serve copies of the same on defendant William Belzberg by personal delivery to Gibson, Dunn & Crutcher not later than June 2, 1986 10:00 A.M.

4. IT IS FURTHER ORDERED that defendant William Belzberg shall file reply papers, if any, not later than June 2, 1986, 8:00 P.M. and shall serve copies of the same

on Pauline Mickler by personal delivery to Milberg Weiss Bershad Specthrie & Lerach not later than June 2, 1986 8:00 P.M.

TEMPORARY RESTRAINING ORDER

5. IT IS FURTHER ORDERED that pending the hearing on this order to show cause and the Court's ruling thereon, Pauline Mickler, William S. Lerach, Eugene Mikolajczyk, Milberg Weiss Bershad Specthrie & Lerach, David B. Gold, David B. Gold, A Professional Law Corporation, Erwin A. Sherman, Lynch, Sherman & Cox, Merrill G. Davidoff, Sherrie R. Savett, Berger & Montague, P.C. and their agents, servants, employees and all persons, corporations, associations and other acting in concert or participation with them be and hereby are enjoined and restrained from prosecuting, or causing to be prosecuted directly or indirectly, the Second State Action or any other action (except this federal action) on behalf of Ashland Oil, Inc., or any class of its shareholders in any involving the subject matter or transaction involved in this federal action.

6. Bond on this temporary restraining order: $10,000

Issued May 28, 1986, at Los Angeles, CA.

DICKRAN TEVRIZIAN
Judge, United States District Court

Presented by:
ROBERT S. WARREN
PHILLIP L. BOSL
ROBERT H. FAIRBANK
SCOTT A. EDELMAN

GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

By ROBERT S. WARREN
Robert S. Warren

Attorneys for Defendant
WILLIAM BELZBERG

Of Counsel:
RICHARD E. NOLAN
WILLIAM L. ROSOFF
DANIEL L. BROCKETT

DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005
(213) 530-4000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 86-2465-DT (Px)

A. JACQUES LOU,
Plaintiff,
v.
WILLIAM BELZBERG, *et al.*,
Defendants,
ASHLAND OIL, INC.,
Nominal Defendant.

PRELIMINARY INJUNCTION

ROBERT S. WARREN
PHILLIP L. BOSL
ROBERT H. FAIRBANK
SCOTT A. EDELMAN

GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

RICHARD E. NOLAN
WILLIAM L. ROSOFF
BANIEL L. BORCKETT

DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005
(213) 530-4000

Attorneys for Defendant
WILLIAM BELZBERG

This matter having come on for hearing on June 3, 1986, at 9:30 a.m., pursuant to an Order to Show Cause re Preliminary Injunction issued by this Court on May 28, 1986, and the Court having considered the application of defendant William Belzberg for a preliminary injunction,

and all papers submitted in support of and in opposition thereto, and having heard argument of counsel, and it appearing to the Court from the application and supporting documents that this is a proper instance for, and good cause exists for, the issuance of a preliminary injunction, and that great and irreparable injury would result to the administration of justice and to defendant William Belzberg and the other defendants in this action if a preliminary injunction were not issued, in that counsel of record for plaintiff in this action and certain other counsel have filed a second action in ths Superior Court of California, County of Los Angeles, entitled *Pauline Mickler v. William Belzberg, et al.,* No. CA 000983 (the "Second State Action"), in which the plaintiff purports to be suing on behalf of the same derivative and class claimants involved in this federal action and in which relief, including preliminary injunctive relief, is sought against, among others, the same defendants as are involved in this federal action based on the identical transaction involved in this federal action;

1. IT IS HEREBY ORDERED that pending the entry of a final judgment or order of dismissal in this federal action, Pauline Mickler, William S. Lerach, Eugene Mikolajczyk, Milberg Weiss Bershad Specthrie & Lerach, David B. Gold, David B. Gold, A Professional Law Corporation, Erwin A. Sherman, Lynch, Sherman & Cox, Merrill G. Davidoff, Sherrie R. Savett, Berger & Montague, P.C., and their agents, servants, employees and all persons, corporations, associations and others acting in concert or participation with them are hereby enjoined and restrained from further prosecuting, or causing to be prosecuted, directly or indirectly, the Second State Action or any other action (except this federal action) on behalf of Ashland Oil, Inc., or any class of its sharehold-

ers in any way involving the subject matter or transaction ivolved in this federal action.

2. Bond on this preliminary injunction: $100,000.00.

Issued June 3, 1986, at Los Angeles, California.

/s/ DICKRAN TEVRIZIAN
Judge, United States District Court

Presented by:
ROBERT S. WARREN
PHILLIP L. BOSL
ROBERT H. FAIRBANK
SCOTT A. EDELMAN

GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

By: ROBERT S. WARREN
Robert S. Warren

Attorneys for Defendant
WILLIAM BELZBERG

Of Counsel:
RICHARD E. NOLAN
WILLIAM L. ROSOFF
DANIEL L. BORCKETT

DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005
(213) 530-4000

APPENDIX H

Tally of Favorable Circuit and District Court Opinions on §17(a) Issue as of 1975 vs. Unfavorable Opinions

I.

CIRCUITS FINDING AN IMPLIED REMEDY UNDER §17(a) AS OF 1975

Second Circuit: *Superintendent of Insurance v. Bankers Life and Casualty Co.*, 430 F.2d 355, 359-60 (2d Cir. 1970), *rev'd on other grounds*, 404 U.S. 6 (1971).

Third Circuit: *Slavin v. Germantown Fire Insurance Co.*, 174 F.2d 799, 807 n.17 (3d Cir. 1949).

Fourth Circuit: *Newman v. Prior*, 518 F.2d 97, 99 (4th Cir. 1975); *Johns Hopkins University v. Hutton*, 488 F.2d 912, 914 (4th Cir. 1973), *cert. denied*, 416 U.S. 916 (1974).

Fifth Circuit: *Phillips v. Alabama Credit Corp.*, 403 F.2d 692 (5th Cir. 1968).

Seventh Circuit: *Allico National Corp. v. Amalgamated Meat Cutters and Butcher Workmen*, 397 F.2d 727 (7th Cir. 1968); *Surowitz v. Hilton Hotels Corp.*, 342 F.2d 596, 603-04 (7th Cir. 1965), *rev'd on other grounds*, 383 U.S. 363 (1966).

II.

CIRCUITS ASSUMING A PRIVATE REMEDY UNDER §17(a)

Second Circuit: *Stirling v. Chemical Bank*, 516 F.2d 1396 (2d Cir. 1975); *1050 Tenants Corp. v. Jakobson*, 503 F.2d 1375, 1376 (2d Cir. 1974); *Republic Technology Fund, Inc. v. Lionel Corp.*, 483 F.2d 540, 545-46, 550-52 (2d Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); *Lanza v.*

Drexel & Co., 479 F.2d 1277, 1280 n.2 (2d Cir. 1973); *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 363 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973); *Segal v. Gordon*, 467 F.2d 602, 605 n.2, 609-10 (2d Cir. 1972); *Dolgow v. Anderson*, 438 F.2d 825, 826-27 (2d Cir. 1970); *Globus v. Law Research Service, Inc.*, 418 F.2d 1276, 1283-87 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); *Katz v. Amos Treat & Co.*, 411 F.2d 1046, 1055-56 and n.10 (2d Cir. 1969): *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969); *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 787 n.2 (2d Cir. 1951).

Third Circuit: *Kubik v. Goldfield*, 479 F.2d 472, 476-77 n.12 (3d Cir. 1973).

Fourth Circuit: *Occidental Life Insurance Co. v. Pat Ryan & Associates, Inc.*, 496 F.2d 1255, 1260 n.1, 1268 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974).

Fifth Circuit: *Ayers v. Wolfinvarger*, 491 F.2d 8, 9 and n.1, 12 and n.9, 16-17 (5th Cir. 1974); *Murtagh v. University Computing Co.*, 490 F.2d 810, 812 n.2, 814-15 (5th Cir.), *cert. denied*, 419 U.S. 835 (1974); *Hope v. Hayden-Stone, Inc.*, 469 F.2d 1060, 1061 (5th Cir. 1972); *Shell v. Hensley*, 430 F.2d 819, 824 n.10 (5th Cir. 1970); *Smith v. Jackson Tool and Die, Inc.*, 419 F.2d 152, 154 (5th Cir. 1969); *Eastside Church of Christ v. National Plan, Inc.*, 391 F.2d 357, 359-60 (5th Cir.), *cert. denied*, 393 U.S. 913 (1968).

Sixth Circuit: *Kellman v. ICS, Inc.*, 447 F.2d 1305, 1308-09 (6th Cir. 1971); *Simmons v. Wolfson*, 428 F.2d 455 (6th Cir. 1970), *cert. denied*, 400 U.S. 999 (1971).

Seventh Circuit: *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287, 1293 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Burns v. Paddock*, 503 F.2d

18, 22-27 (7th Cir. 1974); *Sennott v. Rodman & Renshaw*, 474 F.2d 32, 39 (7th Cir.), *cert. denied*, 414 U.S. 926 (1973); *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123, 125 (7th Cir. 1972); *Avern Trust v. Clarke*, 415 F.2d 1238, 1239, 1241 (7th Cir. 1969), *cert. denied*, 396 U.S. 838 (1969); *Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 410 F.2d 135, 137 (7th Cir.), *cert. denied*, 397 U.S. 963 (1970); *Dasho v. Susquehanna Corp.*, 380 F.2d 262, 264, 266-67 (7th Cir.), *cert. denied*, 389 U.S. 977 (1967).

Eighth Circuit: *Greater Iowa Corp. v. McLendon*, 378 F.2d 783, 789-91 (8th Cir. 1967) (often mis-cited as denying a §17(a) remedy, in fact holds that plaintiffs, who are not purchasers, "have no jurisdictional standing to invoke the provisions of Section 5(a) and Section 17(a)").

Ninth Circuit: *White v. Abrams*, 495 F.2d 724, 727 n.2 (9th Cir. 1974); *Strong v. France*, 474 F.2d 747, 748 n.2, 753 (9th Cir. 1973); *Douglass v. Glenn E. Hinton Investment, Inc.*, 440 F.2d 912, 914 (9th Cir. 1971); *Sackett & Kvan, Inc. v. Beaman*, 399 F.2d 884, 887, 890-92 (9th Cir. 1968); *Turner v. Lundquist*, 377 F.2d 44, 45-46 (9th Cir. 1967); *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 911-12 (9th Cir. 1964).

Tenth Circuit: *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 169, 171-73 (10th Cir. 1974); *Hanraty v. Ostertag*, 470 F.2d 1096, 1098 (10th Cir. 1972); *Horwitz v. Panhandle Eastern Pipe Line Co.*, 438 F.2d 53 (10th Cir. 1971); *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970); *de Haas v. Empire Petroleum Corp.*, 435 F.2d 1223, 1229 n.4, 1231 (10th Cir. 1970).

III.

DISTRICT COURTS FINDING A PRIVATE RIGHT OF ACTION

Second Circuit: *In re Caesars Palace Securities Litigation*, 360 F. Supp. 366, 384-85 (S.D.N.Y. 1973); *Wolfson v. Solomon*, 54 F.R.D. 584, 588 (S.D.N.Y. 1972); *Goldstein v. Grayson*, [1969-1970 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶92,645, at 98,872 (S.D.N.Y. 1970); *Saylor v. Lindsley*, 302 F. Supp. 1174, 1182 (S.D.N.Y. 1969); *Collier v. Granger*, 258 F. Supp. 717, 718-19 (S.D.N.Y. 1966); *Weber v. C.M.P. Corp.*, 242 F. Supp. 321, 323-25 (S.D.N.Y. 1965); *Value Line Fund, Inc. v. Marcus*, [1964-1966 Transfer Binder] Fed. Sec. L. Rep (CCH) ¶91,523, at 94,973 (S.D.N.Y. 1965); *Barnett v. Anaconda Co.*, 238 F. Supp. 766, 770 (S.D.N.Y. 1965); *Dack v. Shanman*, 227 F. Supp. 26, 28-29 (S.D.N.Y. 1964); *Derdiarian v. Futterman Corp.*, 223 F. Supp. 265, 271 (S.D.N.Y. 1963); *Pfeffer v. Cressaty*, 223 F. Supp. 756, 757 (S.D.N.Y. 1963); *Thiele v. Shields*, 131 F. Supp. 416 (S.D.N.Y. 1955); *Osborne v. Mallory*, 86 F. Supp. 869, 878-79 (S.D.N.Y. 1949).

Third Circuit: *Wulc v. Gulf & Western Industries, Inc.*, 400 F. Supp. 99, 103 (E.D. Pa. 1975); *B & B Investment Club v. Kleinert's, Inc.*, 391 F. Supp. 720, 726 (E.D. Pa. 1975); *Metzger v. American Food Management, Inc.*, 389 F. Supp. 469 (W.D. Pa. 1975); *Crowell v. Pittsburgh & Lake Erie Railroad Co.*, 373 F. Supp. 1303, 1310-11 (E.D. Pa. 1974); *Dorfman v. First Boston Corp.*, 336 F. Supp. 1089, 1093, 1096 (E.D. Pa. 1972); *Reube v. Pharmacodynamics, Inc.*, 348 F. Supp. 900, 915-16 (E.D. Pa. 1972).

Fourth Circuit: *MacAndrews & Forbes Co. v. American Barmag Corp.*, 339 F. Supp. 1401, 1405 (D.S.C. 1972).

Fifth Circuit: *Larson v. Tony's Investment, Inc.*, [1967-1969 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶92,324,

at 97,532-34 (M.D. Ala. 1968); *Lynn v. Caraway*, 252 F. Supp. 858, 863-64 (W.D. La. 1966), *aff'd on grounds other than §17(a)*, 379 F.2d 943 (5th Cir. 1967), *cert. denied*, 393 U.S. 951 (1968).

Sixth Circuit: *Smith v. Manausa*, 385 F. Supp. 443, 446-47 (E.D. Ky. 1974), *modified on other grounds*, 535 F.2d 353 (6th Cir. 1976); *Texas Continental Life Insurance Co. v. Bankers Bond Co.*, 187 F. Supp. 14, 22-23 (W.D. Ky. 1960), *rev'd on other grounds and remanded sub. nom., Texas Continental Life Insurance v. Dunne*, 307 F.2d 242 (6th Cir. 1962).

Seventh Circuit: *Freed v. Szabo Food Service Inc.*, [1964-1966 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶91,517, at 94,363-65 (N.D. Ill. 1964); *Newman v. Weinstein*, 229 F. Supp. 440, 442 (S.D. Ill. 1964).

Eighth Circuit: *Cass v. Prior*, 404 F. Supp. 780, 781-82 (D. Minn. 1975); *Jenson v. Continental Financial Corp.*, 404 F. Supp. 792, 794, 805 (D. Minn. 1975).

Ninth Circuit: *Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417, 422-23 (N.D. Cal. 1968), *mod. on other grounds*, 430 F.2d 1202 (9th Cir. 1970); *Whitlow & Associates, Ltd. v. Intermountain Brokers, Inc.*, 252 F. Supp. 943 (D. Hawaii 1966); *Newkirk v. Hayden, Stone & Co.*, [1964-1966 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶91,621 (S.D. Cal. 1965); *Belhumeur v. Dawson*, 229 F. Supp. 78, 87 (D. Mont. 1964).

Tenth Circuit: *Blasdel v. Mullenix*, 356 F. Supp. 924, 927 (W.D. Okla. 1971); *Schamber v. Aaberg*, 186 F. Supp. 52, 57 (D. Colo. 1960).

IV.

DISTRICT COURTS STATING OR HOLDING THERE IS NO §17(a) PRIVATE RIGHT OF ACTION

Dyer v. Eastern Trust & Banking Co., 336 F. Supp. 890, 903-05 (D. Me. 1971); *Emmi v. First Manufacturers National Bank*, 336 F. Supp. 629, 635 (D. Me. 1971); *Architectural League of New York v. Bartos*, 404 F. Supp. 304, 313 (S.D.N.Y. 1975); *Welch Foods Inc. v. Goldman, Sachs & Co.*, 398 F. Supp. 1393 (S.D.N.Y. 1974); *Cowsar v. Regional Recreations, Inc.*, 65 F.R.D. 394, 398 (M.D. La. 1974); *Ferland v. Orange Groves of Florida, Inc.*, 377 F. Supp. 690, 706 (M.D. Fla. 1974); *Hardy v. Sanson*, 356 F. Supp. 1034, 1038 (N.D. Ga. 1973); *Russell v. Travel Concepts Corp.*, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) 95,230, at 98,218 (M.D. Tenn. 1975); *Reid v. Mann*, 381 F. Supp. 525 (N.D. Ill. 1974); *Trussell v. United Underwriters, Ltd.*, 228 F. Supp. 757, 768-69 (D. Colo. 1964); *Gilbert v. Nixon*, 429 F.2d 348, 353 n.4 (10th Cir. 1970) (noting ruling below denying §17(a) action was not appealed).

AMENDED PROOF OF SERVICE BY MAIL

I, CeCe Medina, am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 23, 1988, I served the within Petition for a Writ of Certiorari in re: "A. Jacques Lou vs. William Belzberg" in the United States Supreme Court, October Term 1987, on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with first class postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed to their respective counsel as follows:

David B. Gold
David B. Gold, a Professional
Law Corporation
595 Market Street
Suite 2300
San Francisco, CA 94105
(415) 777-2230

Attorneys for Petitioners
A. Jacques Lou and
Pauline Mickler

Erwin A. Sherman
Lynch, Sherman & Cox
1800 Meidenger Tower
Louisville, KY 40202
(502) 589-4215

Merrill G. Davidoff
Sherrie R. Savett
Martin J. D'Urso
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Attorneys for
Pauline Mickler

Robert S. Warren
Phillip L. Bosl
Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Richard E. Nolan
William L. Rosoff
Daniel L. Brockett
Davis Polk & Wardwell
1 Chase Manhattan Plaza
New York, NY 10005
(212) 530-4000

Attorneys for Respondents
William Belzberg, Hyman
Belzberg, Samuel Belzberg,
First City Financial
Corporation Ltd., Roxboro
Investments (1976) Ltd.,
Bel-Fran Investments Ltd.,
Bel-Cal Holdings Ltd., and
Bel-Alta Holdings, Ltd.

Peter W. James
David A. Destino
McCutcher, Black
Verleger & Shea
600 Wilshire Boulevard
Los Angeles, CA 90017
(213) 624-2400

George Wailand
Cahill Gordon & Reindel
80 Pine Street
New York, NY 10005
(212) 701-3000

Attorneys for Respondent
Drexel Burnham Lambert
Incorporated

Claire Johnson
Parker, Milliken, Clark,
O'Hara & Samuelian
333 South Hope Street
Los Angeles, CA 90071
(213) 683-6500

Attorneys for
Nominal Respondent
Ashland Oil, Inc.

Ronald S. Rolfe
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, NY 10005
(212) 422-3000

Brenton F. Goodrich
Overton, Lyman & Prince
555 S. Flower Street
Los Angeles, CA 90071
(213) 683-1100

Attorneys for Ashland
Director Respondents

All Parties required to be served have been served.

I certify), under penalty of perjury, that the foregoing is true and correct.

Executed on February 23, 1988, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

(2)

Supreme Court, U.S.
FILED
MAR 11 1988
JOSEPH F. SPANIOL
CLERK

No. 87-1430

In the Supreme Court
OF THE
United States

OCTOBER TERM 1987

A. JACQUES LOU,
Petitioner,

vs.

WILLIAM BELZBERG, et al.,
Respondents,

and

ASHLAND OIL, INC.,
Nominal Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT S. WARREN
Counsel of Record
PHILLIP L. BOSL
RORY M. HERNANDEZ
SCOTT A. EDELMAN
SHEILA R. CAUDLE
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

RICHARD E. NOLAN
WILLIAM L. ROSOFF
DANIEL L. BROCKETT
DAVIS POLK & WARDWELL
One Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000
Counsel for Respondent William Belzberg

March 11, 1988

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

48 pp

QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit Court of Appeals' conclusion that a private right of action does not exist under § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), is (i) in accordance with recent decisions of this Court setting forth strict standards for implied private rights of action and (ii) consistent with recent decisions of the other federal circuit and district courts denying § 17(a) claims based on those standards.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
STATEMENT OF THE CASE	1
A. The Lou Action	2
B. The District Court Proceedings	3
C. The Ninth Circuit Decision	5
REASONS FOR DENYING THE WRIT	6
I	
THERE IS NO LIVE CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS ON THE ISSUE PRESENTED	7
II	
THE NINTH CIRCUIT CORRECTLY HELD UNDER THIS COURT'S STANDARDS FOR DETERMINING CONGRESSIONAL INTENT THAT § 17(a) DOES NOT AFFORD A PRIVATE RIGHT OF ACTION	14
A. The Decision Of The Ninth Circuit Conforms With This Court's Controlling Precedents On Implied Rights Of Action	14
B. The Ninth Circuit Properly Applied This Court's Contemporary Legal Context Test In Discerning Congressional Intent	20
III	
PETITIONER HAS NO SUBSTANTIAL INTEREST AT STAKE IN THE ADJUDICATION OF THE § 17(a) ISSUE BECAUSE NO SIGNIFICANT RELIEF HAS BEEN DENIED TO PETITIONER BY VIRTUE OF THE DECISION BELOW	24

TABLE OF CONTENTS

Page

IV

REVIEW AND REVERSAL OF THE QUESTION PRESENTED ULTIMATELY WOULD NOT CHANGE THE RESULT REACHED BELOW 27

CONCLUSION 28

APPENDIX A. List Of Recent Cases Finding No Implied Right Of Action Under § 17(a) Based Upon Analysis Established In *Cort v. Ash* And Its Progeny A-1

TABLE OF AUTHORITIES

Cases

Page

Ackerman v. Clinical Data, Inc. [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,207 (S.D.N.Y. 1985) 11

Allico National Corp. v. Amalgamated Meat Cutters and Butcher Workmen, 397 F.2d 727 (7th Cir. 1968) 22

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1982) ... 25

Architectural League of N.Y. v. Barios, 404 F.Supp. 304 (S.D.N.Y. 1975) 21

Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 551 F.Supp. 580 (S.D. Ohio 1982) 12

Beck v. Cantor Fitzgerald & Co., Inc., 621 F.Supp. 1547 (N.D. Ill. 1985) 12, 13

Bender v. Rocky Mountain Drilling Associates, 648 F.Supp. 330 (D.D.C. 1986) 10

Beres v. Thomas McKinnon Securities, Inc. [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,395 (S.D.N.Y. 1987) 11

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 19, 21, 22

Brabham v. Patenta N.V., 614 F.Supp. 568 (D.Or. 1984) 23

Brannan v. Eisenstein, 804 F.2d 1041 (8th Cir. 1986) 13

Cass v. Prior, 404 F.Supp. 780 (D. Minn. 1975) .. 23

Citizens State Bank v. FDIC, 639 F.Supp. 758 (W.D. Okla. 1986) 13

TABLE OF AUTHORITIES

CASES

Page

Citizens State Bank of Wittenberg v. Continental Assurance Co., 598 F.Supp. 1111 (W.D. Wis. 1984) 13

Cohen v. Goodfriend, 665 F.Supp 152 (E.D.N.Y. 1987) 11

Cort v. Ash, 422 U.S. 66 (1975) 14, 16, 25

Corwin v. Marney, Orton Investments, 788 F.2d 1063 (5th Cir. 1986) 12

Cowsar v. Regional Recreations, Inc., 65 F.R.D. 394 (M.D. La. 1974) 21

Currie v. Cayman Resources Corp., 835 F.2d 780 (11th Cir. 1988) 13

Design Time, Inc. v. Synthetic Diamond Technology, Inc., 674 F.Supp. 1564 (N.D. Ind. 1987) 12

Deviries v. Prudential-Bache Securities, Inc., 805 F.2d 326 (8th Cir. 1986) 13

Dyer v. Eastern Trust & Banking Co., 336 F.Supp. 890 (D. Me. 1971) 21

Emmi v. First-Manufacturers National Bank of Lewiston & Auburn, 336 F.Supp. 629 (D. Me. 1971) 21

Eriksson v. Galvin, 484 F.Supp. 1108 (S.D.N.Y. 1980) 11

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 19

Ethanol Partners Accredited v. Wiener, Zuckerbrot, Weiss & Brecher, 617 F.Supp. 300 (E.D. Pa. 1985) 22

Federal Savings & Loan Insurance Corp. v. Shearson-American Express, Inc., 658 F.Supp. 1331 (D.P.R. 1987) 11

TABLE OF AUTHORITIES

CASES

	Page
Ferland v. Orange Groves of Florida, Inc., 377 F.Supp. 690 (M.D. Fla. 1974)	21
Freeman v. McCormack, 490 F.Supp. 767 (W.D. Okla. 1980)	13
Gilbert Family Partnership v. Nido Corp., No. 86-CV-72781-DT (E.D. Mich. Feb. 9, 1988)	9
Gilman v. Shearson/American Express Inc., 577 F.Supp. 492 (D.N.H. 1983)	10
Greater Iowa Corp. v. McLendon, 378 F.2d 783 (8th Cir. 1967)	21
Hammerman v. Peacock, 607 F.Supp. 911 (D.D.C. 1985)	10
Hardy v. Sanson, 356 F.Supp. 1034 (N.D. Ga. 1973)	21
Herm v. Stafford, 663 F.2d 669 (6th Cir. 1981)	9, 12
Herman & MacLean v. Huddleston, 459 U.S. 375 (1983)	18, 19, 20, 21, 22, 23, 24
In re Storage Technology Corp. Securities Litigation, 630 F.Supp. 1072 (D. Colo. 1986)	13
Ingram Industries, Inc. v. Nowicki, 502 F.Supp. 1060 (E.D. Ky. 1980)	12
Jenson v. Continental Financial Corporation, 404 F.Supp. 792 (D. Minn. 1975)	23
Jiffy Lube International, Inc. v. Grease Monkey Holding Corp., 671 F.Supp. 1275 (D. Colo. 1987)	13
Jones v. First Equity Corp. of Florida, 607 F.Supp. 350 (E.D. Tenn. 1985)	12
Kaufman v. Magid, 539 F.Supp. 1088 (D. Mass. 1982)	10

TABLE OF AUTHORITIES

CASES

	Page
Kellman v. ICS, Inc., 447 F.2d 1305 (6th Cir. 1971)	9, 12
Kilmartin v. H.C. Wainwright & Co., 580 F.Supp. 604 (D. Mass. 1984)	10
Kimmel v. Peterson, 565 F.Supp 476 (E.D. Pa. 1983)	19
Kirshner v. United States, 603 F.2d 234 (2d Cir. 1978), *cert. denied*, 442 U.S. 909 (1979)	8, 11
Landry v. All American Assurance Co., 688 F.2d 381 (5th Cir. 1982)	12, 17
Lincoln National Bank v. Herber, 604 F.2d 1038 (7th Cir. 1979)	9
Manchester Bank v. Connecticut Bank & Trust Co., 497 F.Supp. 1304 (D.N.H. 1980)	10, 11
Masri v. Wakefield, 602 F.Supp. 404 (D.Colo. 1983)	13
Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985)	15, 18
Massaro v. Vernitron Corp., 559 F.Supp. 1068 (D. Mass. 1983)	10
Memphis Housing Authority v. Paine, Webber, Jackson & Curtis, Ins., 639 F.Supp. 108 (W.D. Tenn. 1986)	12, 21, 22, 23
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)	20, 21, 24
Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981)	15
Mosher v. Kane, 784 F.2d 1385 (9th Cir. 1986)	3
Mursau Corp. v. Florida Penn Oil & Gas, Inc., 638 F.Supp. 259 (W.D. Pa. 1986), *aff'd without opinion*, 813 F.2d 398 (3d Cir. 1987)	11

TABLE OF AUTHORITIES

CASES

Page

Newman v. Prior, 518 F.2d 97 (4th Cir. 1975) 8, 11, 23

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981) 15, 16, 26

Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687 (10th Cir), *cert. denied*, 454 U.S. 895 (1981) 10, 13

Peoria Union Stock Yards Co. Retirement Plan v. Penn. Mutual Life Ins. Co., 698 F.2d 320 (7th Cir. 1983) 9, 12

Phillips v. Alabama Credit Corp., 403 F.2d 692 (5th Cir. 1968) 22

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 24

Prestera v. Shearson Lehman Brothers Inc., [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,884 (D. Mass. 1986) 10

Puchall v. Houghton, Cluck, Coughlin & Riley (In re Washington Public Power Supply System Securities Litigation), 823 F.2d 1349 (9th Cir. 1987) ..... *passim*

Ray v. Karris, 780 F.2d 636 (7th Cir. 1985) 9, 12

Reid v. Mann, 381 F.Supp. 525 (N.D. Ill. 1974) .. 21, 25

Richey v. Westinghouse Credit Corp., 667 F.Supp. 752 (W.D. Okla. 1986) 13

Roskos v. Shearson/American Express, Inc., 589 F.Supp. 627 (E.D. Wis. 1984) 13, 19

SEC v. American Realty Trust, 586 F.2d 1001 (4th Cir. 1978) 8, 12

TABLE OF AUTHORITIES

CASES

Page

SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969) .. 8

Sheftelman v. Jones, 605 F.Supp. 549 (N.D. Ga. 1984) 23

Slavin v. Germantown Fire Insurance Co., 174 F.2d 799 (3d Cir. 1949) 22

Somerville v. Major Exploration, Inc., 576 F.Supp. 902 (S.D.N.Y. 1983) 11

Superintendent of Insurance v. Bankers Life and Casualty Co., 430 F.2d 355 (2d Cir. 1970), *rev'd on other grounds*, 404 U.S. 6 (1971) 22

Surowitz v. Hilton Hotels Corp., 342 F.2d 596 (7th Cir. 1965), *rev'd on other grounds*, 383 U.S. 363 (1966) 22

Teamsters Local 282 Pension Trust Fund v. Angelos, 762 F.2d 522 (7th Cir. 1985) 9, 12

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 15, 26

Toberoff v. B-J, Inc. [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,611 (S.D.N.Y. 1988) 11

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 7, 14, 15, 16

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 7, 14, 15, 16

Trussell v. United Underwriters, Ltd., 228 F.Supp. 757 (D. Colo. 1964) 21

Unicorn Field, Inc. v. Cannon Group, Inc., 60 F.R.D. 217 (S.D.N.Y. 1973) 21

Table of Authorities

Cases

Page

Universities Research Association, Inc. v. Coutu, 450 U.S. 754 (1981) 15, 16

Valles Salgado v. Piedmont Capital Corp., 452 F.Supp. 853 (D.P.R. 1978) 11

Wachovia Bank & Trust Co., N.A. v. National Student Marketing Corp., 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) 10

Wagman v. FSC Securities Corp. [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,445 (N.D. Ill. 1985) 13

Welch Foods, Inc. v. Goldman, Sachs & Co., 398 F.Supp. 1393 (S.D.N.Y. 1974) 21

Wulc v. Gulf & Western Industries, Inc., 400 F.Supp. 99 (E.D. Pa. 1975) 23

Xaphes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.Supp. 213 (D. Me. 1984) 10

Yoder v. Orthomolecular Nutrition Institute, Inc., 751 F.2d 555 (2d Cir. 1985) 8, 11

Statutes, Rules and Regulations

Investment Advisers Act of 1940,

Section 206 (15 U.S.C. § 80b-6) 15

Securities Act of 1933

Section 11 (15 U.S.C. § 77k) 17, 18, 19, 25

Section 11(a) (15 U.S.C. § 77k(a)) 17, 25

Section 11(b) (15 U.S.C. § 77k(b)) 17

Section 12 (15 U.S.C. § 77l) 17, 18, 25

Section 12(2) (15 U.S.C. § 77l(2)) 17, 18

Section 13 (15 U.S.C. § 77m) 17

TABLE OF AUTHORITIES

STATUTES, RULES AND REGULATIONS

Page

Section 17(a) (15 U.S.C. § 77q(a)) ..... *passim*
Section 22(a) (15 U.S.C. § 77v(a)) 3
Securities Exchange Act of 1934
Section 10(b) (15 U.S.C. § 78j(b)) 18, 19, 20, 22, 25, 26
Securities and Exchange Commission,
Rule 10b-5 (17 C.F.R. § 240.10b-5) 26
United States Code, Title 18
Sections 1961-68 3
United States Code, Title 28
Section 1441(a) 3, 5, 7
Section 1441(c) 3, 5, 7

Other Authorities

H.R. Rep. No. 85, 73d Cong. 1st Sess. 9 (1930) 17
Loss, L., Securities Regulation, 3913 (2d ed. Supp. 1969) 21

No. 87-1430

In the Supreme Court

OF THE

United States

OCTOBER TERM 1987

A. JACQUES LOU,
Petitioner,

VS.

WILLIAM BELZBERG, et al.,
Respondents,

and

ASHLAND OIL, INC.,
Nominal Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent William Belzberg respectfully requests this Court to deny the petition for a writ of certiorari, seeking review of the judgment and opinion issued by the United States Court of Appeals for the Ninth Circuit on November 12, 1987, and reported at 834 F.2d 730 (1987).

STATEMENT OF THE CASE

This litigation grows out of the April 1986 purchase by Ashland Oil Company, Inc. ("Ashland") of the 9.2% stake

of Ashland common stock held by First City Financial Corporation Limited and First City Trust Company (collectively, "First City"), two Canadian entities controlled by the Belzberg family. Ashland entered into the stock purchase agreement after First City's efforts to acquire 100% of Ashland stock at $60.00 per share were unsuccessful. Under the stock purchase agreement, Ashland agreed to purchase 2.6 million shares owned by First City for $51.00 per share, a price below the then market price for Ashland stock. The central question on the underlying merits is whether the decision by the Board of Directors of Ashland was protected by the business judgment rule or whether it constituted an allegedly improper "greenmail" payment. The § 17(a) private right of action issue raised by Petitioner will not determine the outcome of any underlying issue on the merits.

A. The Lou Action.

This action has had a complicated procedural history from the outset. Petitioner Lou first filed her complaint in California state court on April 6, 1986 seeking, among other things, an injunction blocking the stock purchase agreement, rescission of the agreement, and imposition of a constructive trust on all funds received by First City from Ashland pursuant to the transaction. She purportedly brought this action as a derivative suit on behalf of Ashland and as a class action on behalf of all persons, save defendants, who owned shares of Ashland common stock on April 1, 1986 — the date the stock purchase agreement was publicly announced.

On April 14, 1986, Petitioner filed an amended complaint which was identical in material respect to the original complaint, except for the addition of two claims under § 17(a) of the Securities Act of 1933. Pursuant to

§ 22(a) of the 1933 Act, 15 U.S.C. § 77v(a), claims brought under the Act in state court are nonremovable. However, the § 17(a) claims failed to plead an essential element under then existing Ninth Circuit law. Specifically, prior to the abolition of any private right of action under § 17(a) in *Puchall v. Houghton, Cluck, Coughlin & Riley (In re Washington Public Power Supply System Securities Litigation)*, 823 F.2d 1349 (9th Cir. 1987), it was settled in the Ninth Circuit that "[i]n order to bring a claim under section 17(a), the plaintiff must be a purchaser or seller." *Mosher v. Kane*, 784 F.2d 1385, 1390-91 (9th Cir. 1986). Because Petitioner failed to allege that she or any other member of the purported class was a defrauded purchaser or seller during the relevant period, the § 17(a) claims were facially deficient.

In addition to the § 17(a) allegations, the amended pleading contains various state law claims and separate and independent claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO").

B. The District Court Proceedings.

On April 17, 1986, Respondent William Belzberg removed the action to the United States District Court for the Central District of California pursuant to 28 U.S.C. §§ 1441(a) and (c). Removal was predicated on the presence of separate and independent claims arising under the federal RICO statute, a basis for federal jurisdiction which could not be defeated by the inclusion of otherwise nonremovable claims purporting to arise under the 1933 Act. Moreover, Respondent Belzberg contended that because the § 17(a) causes of action were facially insufficient, the nonremoval provision of the 1933 Act was inapplicable.

Following removal, Petitioner moved to remand the action to state court. Simultaneously, certain of the defendants, including Respondent, cross-moved to transfer the action to the Southern District of New York, where the stock purchase agreement was negotiated and performed and where the principal witnesses and documents are located.

On May 15, 1986, the District Court denied Petitioner's motion to remand and granted Respondent's cross-motion to transfer. The Court denied the motion to remand on two grounds. First, it reasoned that the nonremoval provision of the 1933 Act did not apply because the § 17(a) claims on their face failed to state a valid claim for relief. Second, the Court determined that the RICO claims were "separate and independent" from the § 17(a) claims, making the action removable under 28 U.S.C. § 1441(c) regardless of the presence of the 1933 Act claims.

Following removal and transfer of the *Lou* action, a new class representative, Pauline Mickler, represented by some of the same counsel as Petitioner Lou, commenced yet another class action and shareholders' derivative suit in California state court on May 27, 1986. This action, captioned *Mickler v. William Belzberg, et al.*, Case No. CA 000983, is nearly identical to the earlier *Lou* action, except for the addition of certain defendants and law firms and the deletion of the § 17(a) claims and RICO claims, which provided the original basis for the removal of the *Lou* action.[1]

---

[1]Plaintiff Mickler's willingness to voluntarily forego the assertion of claims under § 17(a) in her "mirror" state court complaint undercuts Petitioner's claim here that she has been deprived of significant relief in that court.

Upon Respondent's motion, the District Court enjoined prosecution of the *Mickler* action.

C. The Ninth Circuit Decision.

Petitioner Lou and Plaintiff Mickler, as well as their counsel, appealed all three orders — denial of the remand motion, grant of a change of venue and entry of a preliminary injunction — to the United States Court of Appeals for the Ninth Circuit. The appeals were argued in early October 1986, but ordered withdrawn from submission in February 1987 pending the decision by an *en banc* panel of the Ninth Circuit in *Puchall*. After the *Puchall* case was decided in July 1987, the *Lou* appeal was ordered resubmitted.

The Ninth Circuit affirmed the District Court's ruling on the motion to remand, but for reasons different from those relied upon by the lower court. On the authority of the *Puchall* opinion, the Ninth Circuit held that there was no private right of action under § 17(a). The Court therefore did not reach the issues decided by the District Court, namely, whether the § 17(a) claims had otherwise been properly pled and whether they were "separate and independent" from the RICO claims. The Court held instead that state and federal courts have concurrent jurisdiction over RICO claims and that removal thus was proper under 28 U.S.C. § 1441(a). The Court affirmed transfer of the *Lou* action to the Southern District of New York, but vacated the stay in the *Mickler* action. That action is now proceeding in California state court. This petition challenges only the Ninth Circuit's § 17(a) determination.

REASONS FOR DENYING THE WRIT

Respondent Belzberg opposes issuance of a Writ of Certiorari on four grounds.

First, contrary to Petitioner's contention, there is no clear conflict among the federal Courts of Appeals on the issue of whether § 17(a) of the 1933 Act creates a private right of action. The consistent trend among the Courts of Appeals which have reached the issue is to deny a private remedy. Indeed, every Circuit which has recently addressed the question either has expressly denied a private right of action or has called into question its past precedents to the contrary.

Second, the decisions of the Ninth Circuit in *Puchall* and in this case are in full accord with the standards articulated and applied by this Court in determining whether a statute creates an implied private right of action.

Third, Petitioner, as a class representative of the shareholders of Ashland, and as a derivative representative of the corporation, has no substantial interest at stake in the outcome of this controversy because neither the shareholder class nor the derivatively represented corporation has been deprived of a state forum in which to pursue its many claims.

Finally, the procedural posture of this action militates against granting certiorari, since review and reversal of the question presented ultimately would not change the result reached below.

I

THERE IS NO LIVE CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS ON THE ISSUE PRESENTED

Petitioner, at footnote 3, purports to provide "a summary of the recent rulings by the Circuits," which supposedly shows the existence of a conflict on the § 17(a) issue. The summary, however, is materially defective.

The divergence of authority to which Petitioner refers is illusory because most of the cases cited were decided *prior* to this Court's seminal decisions in *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), which specifically prescribed the circumstances under which a private right of action may be implied. Indeed, the courts which have applied the *Touche Ross/Transamerica* analysis to § 17(a) have uniformly determined that no such private right of action exists. (A list of the cases which have applied the required analysis to § 17(a) and determined that a private action may not be implied has been attached as Appendix A for the Court's convenience.)

Petitioner's summary further fails to bring to the Court's attention cases decided by the Second, Fourth and Seventh Circuits which have seriously questioned the continuing vitality of the *only* federal appellate decisions finding an implied private right of action under § 17(a), and, therefore, creating the existence of an inter-Circuit conflict on that question.[2]

---

[2]It is undisputed that the Fifth, Eighth, Ninth and Eleventh Circuits have expressly denied a private right of action under § 17(a).

In *Yoder v. Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555 (2d Cir. 1985), the *Second Circuit* specifically questioned the propriety of its earlier decision in *Kirshner v. United States*, 603 F.2d 234 (2d Cir. 1978), *cert. denied*, 442 U.S. 909 (1979), which had found a private right of action. Writing for the court, Judge Friendly, whose concurring remarks in *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), formed the basis of the *Kirshner* decision, stated:

> Our references in this opinion to the Securities Act are not intended as taking any position on the question of whether there is an implied cause of action for damages for violation of § 17(a) of the 1933 Act, 15 U.S.C. § 77q(a).... In *Kirshner v. United States*, ... this court held, in an opinion characterized by Professor Loss as being 'with no analysis,' Fundamentals of Securities Regulations 1149 (1983), that there was such a cause of action. *This conclusion may be open to reexamination, however, in light of the subsequent Supreme Court decisions noted above and Professor Loss' comparison of the differences among the provisions for civil liability contained in the 1933 and 1934 Acts, and his analysis of the legislative history of § 17. See* Loss, *supra,* at 1148-50; *see also* 3 Bromberg and Lowenfels, Securities Law § 8.5 (330)-(338) (1982).

751 F.2d at 559 n.3 (emphasis added).

The *Fourth Circuit* also has indicated a lack of confidence in its previous recognition of an implied right of action. In *SEC v. American Realty Trust*, 586 F.2d 1001 (4th Cir. 1978), the Fourth Circuit explicitly called into question its earlier decision in *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975), which found a private right of action under § 17(a). The court in *American Realty Trust* stated:

"[T]o hold that § 17(a)(2) creates a private right of action would probably require some substantial disregard of the whole legislative scheme." 586 F.2d at 1006.

The *Seventh Circuit* similarly has retreated from its holding in *Lincoln National Bank v. Herber*, 604 F.2d 1038 (7th Cir. 1979). In its most recent decisions on the subject, the court stated that the issue of whether an implied right of action under § 17(a) exists is an "open question" in that Circuit. *Ray v. Karris*, 780 F.2d 636, 641 n.3 (7th Cir. 1985); *Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522, 530 (7th Cir. 1985); *Peoria Union Stock Yards Co. Retirement Plan v. Penn. Mutual Life Ins. Co.*, 698 F.2d 320, 323 (7th Cir. 1983).

Additionally, Petitioner erroneously cites a Sixth Circuit case, *Kellman v. ICS, Inc.*, 447 F.2d 1305 (6th Cir. 1971), as holding that § 17(a) creates a private right of action. *Kellman* did not do so, as confirmed by the Sixth Circuit's subsequent decision in *Herm v. Stafford*, 663 F.2d 669 (6th Cir. 1981), in which the Sixth Circuit made clear that it had not decided the § 17(a) question. After noting decisions in other Circuits and the fact that the § 17(a) issue was not raised on appeal, the court in *Herm* expressly declared: "[W]e assume, *without deciding*, that a private right of action exists." 663 F.2d at 678 n.12 (emphasis added); *see also Gilbert Family Partnership v. Nido Corp.*, No. 86-CV-72781-DT (E.D. Mich. Feb. 9, 1988) (available on Lexis, 1988 U.S. Dist. Lexis 1039) (in finding *no* private right of action under § 17(a), the court preliminarily noted that the "Court of Appeals for the Sixth Circuit has never spoken on the question.").

Finally, Petitioner has failed to mention the state of the law respecting § 17(a) in the *Tenth*, *First* and *District of Columbia Circuits*. The Tenth Circuit has expressed "considerable doubt" as to whether a private right of

action exists under § 17(a). *See Ohio v. Peterson, Lowry, Rall, Barber & Ross,* 651 F.2d 687, 689 n.1 (10th Cir.), *cert. denied,* 454 U.S. 895 (1981). Although the First and District of Columbia Circuits have not yet ruled on the question, the overwhelming majority of district courts in these Circuits recently have, as set forth below, denied a private right of action under § 17(a).

For the convenience of the Court, the following is a review of the state of the law on § 17(a) on a Circuit-by-Circuit basis:

DISTRICT OF COLUMBIA: The District of Columbia Circuit explicitly left open the question of whether § 17(a) gives rise to a private right of action in *Wachovia Bank & Trust Co., N.A. v. National Student Marketing Corp.*, 650 F.2d 342, 350 n.19 (D.C. Cir. 1980), *cert. denied,* 452 U.S. 954 (1981). Two district courts, *Bender v. Rocky Mountain Drilling Associates,* 648 F.Supp. 330, 334 n.3 (D.D.C. 1986), and *Hammerman v. Peacock,* 607 F.Supp. 911, 915 (D.D.C. 1985), have declined to imply a private right of action under § 17(a).

FIRST CIRCUIT: The First Circuit has not addressed the issue of § 17(a). The district courts, however, consistently have refused to find a private right of action. *Prestera v. Shearson Lehman Brothers Inc.*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,884, at ¶ 94,290 (D. Mass. 1986); *Xaphes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.Supp. 213, 217 (D. Me. 1984); *Kilmartin v. H.C. Wainwright & Co.*, 580 F.Supp. 604, 609 (D. Mass. 1984); *Gilman v. Shearson/American Express, Inc.*, 577 F.Supp. 492, 497 (D.N.H. 1983); *Massaro v. Vernitron Corp.*, 559 F.Supp. 1068, 1078 (D. Mass. 1983); *Kaufman v. Magid,* 539 F.Supp. 1088, 1098 (D. Mass. 1982); *Manchester Bank v. Connecticut Bank & Trust Co.*,

497 F.Supp. 1304, 1314 (D.N.H. 1980). *But see Federal Savings & Loan Insurance Corp. v. Shearson-American Express, Inc.*, 658 F.Supp. 1331, 1344 (D.P.R. 1987) (finding action); *Valles Salgado v. Piedmont Capital Corp.*, 452 F.Supp. 853, 857-58 (D.P.R. 1978) (same).

SECOND CIRCUIT: In *Kirshner v. United States*, 603 F.2d 234 (2d Cir. 1978), *cert. denied*, 442 U.S. 909 (1979), the Second Circuit found that a private right of action existed under § 17(a). The Second Circuit, however, has indicated that it would reexamine its finding in *Kirshner*. *See Yoder v. Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555, 559 n.3 (2d Cir. 1985). Numerous district courts have refused to follow *Kirshner* in light of intervening decisions by this Court on implied rights of action and have determined that § 17(a) does not provide a private right of action. *See, e.g., Beres v. Thomas McKinnon Securities, Inc.*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,395, at 97,072 (S.D.N.Y. 1987); *Cohen v. Goodfriend*, 665 F.Supp. 152, 155-56 (E.D.N.Y. 1987); *Ackerman v. Clinical Data, Inc.*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,207, at 91,570-71 (S.D.N.Y. 1985); *Somerville v. Major Exploration, Inc.*, 576 F.Supp. 902 (S.D.N.Y. 1983); *Eriksson v. Galvin*, 484 F.Supp. 1108, 1127 (S.D.N.Y. 1980). *But see Toberoff v. B-J, Inc.*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,611, at 97,739 (S.D.N.Y. 1988) (finding action based upon *Kirshner*).

THIRD CIRCUIT: *Mursau Corp. v. Florida Penn Oil & Gas, Inc.*, 638 F.Supp. 259 (W.D. Pa. 1986), *aff'd without opinion*, 813 F.2d 398 (3d Cir. 1987) (denies action).

FOURTH CIRCUIT: In *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975), the court found an implied right of action under § 17(a). The Fourth Circuit, subsequently examin-

ing the point, indicated that the existence of a § 17(a) private right of action is subject to doubt. See *SEC v. American Realty Trust,* 586 F.2d 1001, 1006 (4th Cir. 1978).

FIFTH CIRCUIT: *Corwin v. Marney, Orton Investments,* 788 F.2d 1063 (5th Cir. 1986) (denies action); *Landry v. All American Assurance Co.,* 688 F.2d 381 (5th Cir. 1982) (denies action).

SIXTH CIRCUIT: In its most recent decision on the subject, the Sixth Circuit has declared that the § 17(a) question is an open issue. *Herm v. Stafford,* 663 F.2d 669 (6th Cir. 1981). Significantly, in so concluding, the court did not mention *Kellman v. ICS, Inc.,* 447 F.2d 1305 (6th Cir. 1971), a case which Petitioner erroneously cites as finding an implied right of action. District courts within the Sixth Circuit have routinely held that no private action lies under § 17(a). *See Memphis Housing Authority v. Paine, Webber, Jackson & Curtis, Inc.,* 639 F.Supp. 108, 111-14 (W.D. Tenn. 1986); *Jones v. First Equity Corp. of Florida,* 607 F.Supp. 350, 354-55 (E.D. Tenn. 1985); *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 551 F.Supp. 580, 586-87 (S.D. Ohio 1982); *Ingram Industries, Inc. v. Nowicki,* 502 F.Supp. 1060, 1069 (E.D. Ky. 1980).

SEVENTH CIRCUIT: The Seventh Circuit has declared that the issue is an "open question." *Ray v. Karris,* 780 F.2d 636, 641 n.3 (7th Cir. 1985); *Teamsters Local 282 Pension Trust Fund v. Angelos,* 762 F.2d 522, 530 (7th Cir. 1985); *Peoria Union Stock Yards Co. Retirement Plan v. Penn. Mutual Life Ins. Co.,* 698 F.2d 320, 323 (7th Cir. 1983). The district courts in that Circuit overwhelmingly have denied a private right of action under § 17(a). *Design Time, Inc. v. Synthetic Diamond Technology, Inc.,* 674 F.Supp. 1564, 1572-74 (N.D. Ind. 1987); *Beck v. Cantor, Fitzgerald & Co., Inc.,* 621 F.Supp. 1547, 1559-60

(N.D. Ill. 1985); *Wagman v. FSC Securities Corp.*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,445, at 92,716 (N.D. Ill. 1985); *Citizens State Bank of Wittenberg v. Continental Assurance Co.*, 598 F.Supp. 1111, 1114-15 (W.D. Wis. 1984); *Roskos v. Shearson/American Express, Inc.*, 589 F.Supp. 627, 630-31 (E.D. Wis. 1984).

EIGHTH CIRCUIT: *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326, 328 (8th Cir. 1986) (denies action); *Brannan v. Eisenstein*, 804 F.2d 1041, 1043 n.1 (8th Cir. 1986) (denies action).

NINTH CIRCUIT: *Puchall v. Houghton, Cluck, Coughlin & Riley (In re Washington Public Power Supply System Securities Litigation)*, 823 F.2d 1349 (9th Cir. 1987) (denies action).

TENTH CIRCUIT: The Tenth Circuit has expressed "considerable doubt" about whether § 17(a) offers a private right of action. *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 689 n.1 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981). The prevailing view among Tenth Circuit district courts is that no private right of action exists. *Jiffy Lube International, Inc. v. Grease Monkey Holding Corp.*, 671 F.Supp. 1275, 1278 (D. Colo. 1987); *Citizens State Bank v. FDIC*, 639 F.Supp. 758, 779-80 (W.D. Okla. 1986); *In re Storage Technology Corp. Securities Litigation*, 630 F.Supp 1072, 1079-80 (D. Colo. 1986); *Masri v. Wakefield*, 602 F.Supp. 404, 406 (D. Colo. 1983); *Freeman v. McCormack*, 490 F.Supp. 767, 768 (W.D. Okla. 1980). *But see Richey v. Westinghouse Credit Corp.*, 667 F.Supp. 752 (W.D. Okla. 1986).

ELEVENTH CIRCUIT: *Currie v. Cayman Resources Corp.*, 835 F.2d 780 (11th Cir. 1988) (denies action).

Thus, Petitioner's assertion of conflict among the Circuits is without foundation. There is presently no live

controversy on the issue within the Circuits. All Circuits either expressly deny a private right of action under § 17(a) or regard the issue as an open question, and a distinct consensus that no private right exists has developed within the federal system. Thus, there is no need for this Court to grant certiorari to resolve a conflict which simply does not exist.

II

THE NINTH CIRCUIT CORRECTLY HELD UNDER THIS COURT'S STANDARDS FOR DETERMINING CONGRESSIONAL INTENT THAT § 17(a) DOES NOT AFFORD A PRIVATE RIGHT OF ACTION

A. The Decision Of The Ninth Circuit Conforms With This Court's Controlling Precedents On Implied Rights Of Action.

Ironically, although Petitioner presents the question of whether a private right of action should be implied under a federal statute, the petition does not mention, much less discuss, recent decisions of this Court which are determinative of this issue. Inexplicably, Petitioner fails to address the Ninth Circuit's decision under the analytic framework prescribed by this Court. Proper analysis demonstrates that the decision reached by the Ninth Circuit Court of Appeals is correct and fully consonant with this Court's controlling precedents on the subject of implied rights of action.

In a series of recent decisions, principally *Cort v. Ash*, 422 U.S. 66 (1975), *Touche Ross*, and *Transamerica*, this Court has revealed its reluctance to imply a private right of action under a federal regulatory statute absent a clear, ascertainable legislative intent to grant such a right. Consistent with those decisions, this Court has

articulated a strict standard for determining whether a given statutory provision gives rise to an implied private right of action. *Touche Ross,* 442 U.S. at 578. These decisions leave no doubt that congressional intent overrides all other considerations. Thus, in *Touche Ross,* this Court declined to imply a private right of action under § 17(a) of the 1934 Act because it found no evidence of congressional intent to do so. Its task, said the Court, "is limited solely to determining whether Congress intended to create the private right of action asserted," 442 U.S. at 568, and not "whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Id.* at 578.

In *Transamerica,* this Court refused to find an implied right of action under § 206 of the Investment Advisers Act of 1940, an antifraud provision strikingly similar to § 17(a). As it did in *Touche Ross,* this Court confined its inquiry to the question of congressional intent, determining that "[t]he dispositive question remains whether Congress intended to create any such remedy." 444 U.S. at 24.

By confining its analysis to the specific question of congressional intent, this Court sharply has defined the standards which must be met before a private right of action may be implied. Following *Touche Ross* and *Transamerica,* this Court repeatedly has applied its strict approach to deny implication of private rights of action.[3] The Court's recent decisions reaffirming *Touche Ross* and

---

[3] *See, e.g., Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134 (1985); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,* 453 U.S. 1 (1981); *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630 (1981); *Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77 (1981); *Universities Research Ass'n, Inc. v. Coutu,* 450 U.S. 754 (1981).

Transamerica establish that a private right of action may be implied only in those instances where the Court can find that "Congress intended to create the private right of action asserted . . . ." *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 770 (1981).

The intent of Congress is to be discerned solely by examining three factors: (a) the language of the statute; (b) its legislative history; and (c) whether implying a private right of action would be consistent with the overall statutory scheme. *Touche Ross*, 442 U.S. at 575-76; *Transamerica*, 444 U.S. at 23-24. "[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981).

Applying the analysis mandated by this Court, the Ninth Circuit properly concluded in *Puchall* that Congress did not intend to create a private right of action under § 17(a). After carefully examining the language of the statute, its legislative history and the statutory context within which it appeared, the Ninth Circuit determined that implication of a private right of action under § 17(a) would be entirely *inconsistent* with Congress' manifest intent. That reasoned decision is sound and fully consistent with this Court's decisions refusing to imply a private right of action under a federal statute absent a clear showing of congressional intent to do so. Nor is the Ninth Circuit alone in reaching this conclusion. The federal courts which have analyzed § 17(a) within the framework established by this Court in *Cort* and its progeny similarly have concluded that no private right of action may be implied under § 17(a). (See Appendix A.)

In challenging the decision below, Petitioner does not dispute that neither the language of § 17(a)[4] nor its legislative history[5] supports implication of a private right of action. *Puchall,* 823 F.2d at 1353-55. However, Petitioner totally ignores the fact that implication of a private right of action under § 17(a) would be utterly inconsistent with the comprehensive statutory structure and would supplant existing, express remedies. In enacting the 1933 Act, Congress provided express private rights of action in §§ 11 and 12, subject to strict procedural limitations and specific defenses defined in the Act. For example, both § 11 and § 12 are subject to the one-year statute of limitations in § 13 of the Act. *See* § 15 U.S.C. § 77m. Under § 11(a), only those purchasing securities issued under the challenged registration statement can sue. Section 11(b) grants a defendant other than the issuer a "due diligence" defense. Section 12 requires privity between the purchaser and seller.

Although § 17(a) may prohibit the same type of conduct as §§ 11 and 12(2), on its face § 17(a) does not contain the procedural limitations and exclusions imposed by Congress on actions brought under §§ 11 and 12(2). Congress would not on the one hand create express

---

[4]The statutory language of § 17(a) reveals no intent to create a private right of action. The statute "merely represents a general censure of fraudulent practices." *Puchall*, 823 F.2d at 1353; *Landry v. All American Assurance Co.*, 688 F.2d 381, 389 (5th Cir. 1982).

[5]The legislative history of the 1933 Act confirms that Congress did not intend to create an implied right of action. The section of the House Committee Report entitled "Civil Liberties" states that "sections 11 and 12 (15 U.S.C. sections 77k and 77*l*) create and define the civil liabilities imposed by the act and the machinery for their enforcement." H.R. Rep. No. 85, 73d Cong., 1st Sess. 9 (1933). This section of the Report details the private rights of action expressly enacted in §§ 11 and 12, but does not mention § 17(a) at all.

rights of action under §§ 11 and 12 subject to carefully crafted defenses, and on the other hand intend an implied right of action under the broad anti-fraud provisions of § 17(a) subject to none of the same limitations. Thus, as the Ninth Circuit properly concluded, implying a private remedy under § 17(a) would undermine the carefully crafted limitations imposed by Congress on §§ 11 and 12(2). 823 F.2d at 1354-55. *Accord Landry v. All American Assurance Co.*, 688 F.2d 381, 390 (5th Cir. 1982) (an implied cause of action under § 17(a) "would effectively frustrate the carefully laid framework of the Act"). *See also Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) ("The assumption of inadvertent omission is rendered especially suspect upon close consideration of [the statute's] interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' ")

Nor does this Court's decision in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), compel a different result. In *Huddleston*, the central issue was whether an implied right of action could be found under § 10(b) of the 1934 Act even though § 11 of the 1933 Act provided an express private cause of action for conduct proscribed under § 17(a) of the 1933 Act. Petitioner fails to acknowledge that *Huddleston* was decided *after* an implied right under § 10(b) had been universally recognized by the courts for more than 35 years, 459 U.S. at 380, and that Congress had implicitly ratified these consistent, pervasive judicial determinations. *Id.* at 385. Furthermore, the *Huddleston* Court explicitly recognized that § 11 and § 10(b) address different types of wrongdoing, *id.* at 382,

and that § 10(b), unlike § 17(a), requires proof of scienter and does not encompass negligent conduct. *Id.* at 383.[6]

Moreover, in *Huddleston* this Court explicitly recognized that "extension of 10(b) to negligent conduct would have allowed causes of action for negligence under the express remedies to be brought instead under § 10(b), 'thereby nullify[ing] the effectiveness of the carefully drawn procedural restrictions on these express actions.' " 459 U.S. at 384 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 (1976)).

Thus, far from undermining the decision below, *Huddleston* actually provides further support that an implied right of action under § 17(a) would be inconsistent with the statutory structure and frustrate the overall legislative scheme. The Ninth Circuit recognized this very point in *Puchall:*

> To permit a private right of action under § 17(a) would cause the statutory and judicially-crafted restrictions on § 10(b) of the 1934 Act and §§ 11 and 12 of the 1933 Act to atrophy and fall away as securities fraud cases hustled in the back door of § 17.

823 F.2d at 1356 n.17 (quoting *Roskos v. Shearson/American Express, Inc.*, 589 F.Supp. 627, 631 (E.D. Wis. 1984)); *see also Kimmel v. Peterson*, 565 F.Supp. 476, 485 (E.D. Pa. 1983) ("[I]mplication of a private right of action under section 17(a) would allow and encourage the total circumnavigation of the new restrictions the Court has placed on a section 10(b) cause of action.").

---

[6]Section 10(b) also requires an actual purchase or sale (*Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733-34 (1975)), whereas § 17(a) can, by its language, apply to offers.

B. The Ninth Circuit Properly Applied This Court's Contemporary Legal Context Test In Discerning Congressional Intent.

Contrary to Petitioner's contention, the Ninth Circuit correctly assessed the contemporary legal context test for determining congressional intent. Thus, the decision below is fully consistent with *Huddleston* and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982).

In *Curran*, this Court, acknowledging that the lower federal courts before 1974 had "routinely and consistently" and without "any doubt" recognized an implied right of action under the Commodity Exchange Act, determined that the extensive reenactment of that Act in 1974 — in view of that "uniform and well-understood" case law and the "absence of any dispute" — demonstrated congressional intent to preserve that remedy. 456 U.S. at 379-81. The *Huddleston* Court similarly ruled that the 1975 reenactment and amendment of the Securities Exchange Act of 1934 suggested congressional acceptance of an implied private right of action under § 10(b) because by 1975 "federal courts had consistently and routinely" recognized such implied rights of action. 459 U.S. at 385.

The *Huddleston-Curran* "legislative reenactment" argument posited by Petitioner, however, is insupportable with respect to § 17(a). In contrast to the statutory provisions involved in those two decisions, § 17(a) did not enjoy such unanimity among the courts in 1975.[7] At the

---

[7]The Court in *Huddleston* noted that in 1975 all but two district courts had allowed a private remedy under § 10(b), and one had been overruled and the other was not followed by other courts in the district or circuit. Thus, unlike the situation existing with respect to

time the 1933 Act was amended in 1975, "there remain[ed] a divergence of opinion on the subject" of whether a private right of action existed under § 17(a). *See Reid v. Mann*, 381 F. Supp. 525, 528 (N.D. Ill. 1974); *see also Unicorn Field, Inc. v. Cannon Group, Inc.*, 60 F.R.D. 217, 224 (S.D.N.Y. 1973). The courts and commentators were divided on this question and, reflective of this division, numerous courts had concluded that there was *no* implied right of action under § 17(a).[8] Most significantly, this Court itself contemporaneously acknowledged *in 1975* that the existence of a private right of action under § 17(a) had not yet been resolved. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733-34 n.6 (1975) (citing split in authorities). Accordingly, as the Ninth Circuit ultimately concluded, the *Huddleston-Curran* argument sheds no light on the implication of a private right of action under § 17(a). *Puchall*, 823 F.2d at 1356-57; *see also Memphis Housing Authority v.*

---

§ 17(a), the Court concluded that the issue was "simply beyond peradventure." 459 U.S. at 380 n.10. Similarly, every court that had examined the statute at issue in *Curran* prior to 1974 had concluded that there was a private right of action under the CEA. 456 U.S. at 379-81.

[8] *See, e.g., Greater Iowa Corp. v. McLendon*, 378 F.2d 783 (8th Cir. 1967); *Architectural League of N.Y. v. Bartos*, 404 F.Supp. 304, 313 (S.D.N.Y. 1975); *Welch Foods, Inc. v. Goldman, Sachs & Co.*, 398 F.Supp. 1393, 1399-1401 (S.D.N.Y. 1974); *Reid v. Mann*, 381 F.Supp. 525, 526-28 (N.D. Ill. 1974); *Ferland v. Orange Groves of Florida, Inc.*, 377 F.Supp. 690, 706-07 (M.D. Fla. 1974); *Cowsar v. Regional Recreations, Inc.*, 65 F.R.D. 394, 398 (M.D. La. 1974); *Hardy v. Sanson*, 356 F.Supp. 1034, 1038 (N.D. Ga. 1973); *Dyer v. Eastern Trust & Banking Co.*, 336 F.Supp. 890, 903-05 (D. Me. 1971); *Emmi v. First-Manufacturers National Bank of Lewiston & Auburn*, 336 F.Supp. 629, 635 (D. Me. 1971); *Trussell v. United Underwriters, Ltd.*, 228 F.Supp. 757, 766-69 (D. Colo. 1964). *See also* L. Loss, *Securities Regulation* 3913, 3914 (2d ed. Supp. 1969) ("the only considered opinions" reject a § 17(a) cause of action).

Paine, Webber, Jackson & Curtis, Inc., 639 F.Supp. 108, 113 (W.D. Tenn. 1986) ("reasoning of *Curran*" not applicable to § 17(a)); *Ethanol Partners Accredited v. Wiener, Zuckerbrot, Weiss & Brecher*, 617 F. Supp. 300, 303 (E.D. Pa. 1985) (*Huddleston* not controlling in examining whether there is a private right of action under § 17(a)).

Manifestly, there was no uniform, established line of precedent in 1975 recognizing an implied right of action under § 17(a). Petitioner's resort to counting cases is mere sophistry. This Court in *Blue Chip Stamps* and many other courts have concluded, as did the Ninth Circuit in *Puchall*, that, as of 1975, the state of the law was unclear on whether a private right of action existed under § 17(a).[9] Thus, in rejecting the argument that *Huddleston*

---

[9]In Appendix H of her petition, Petitioner cites cases and contends that Circuits had found an implied right of action under § 17(a) as of 1975. Many of these cases simply do not stand for the stated proposition. A careful reading of these cases demonstrates that, in some of them, the issue of an implied remedy was either not addressed or not raised. *See, e.g., Superintendent of Insurance v. Bankers Life and Casualty Co.*, 430 F.2d 355 (2d Cir. 1970), *rev'd on other grounds*, 404 U.S. 6 (1971) (issue of implied right of action not raised or discussed); *Slavin v. Germantown Fire Insurance Co.*, 174 F.2d 799 (3d Cir. 1949) (plaintiff's suit was brought solely under § 10(b) and did not involve any § 17(a) claims); *Phillips v Alabama Credit Corp.*, 403 F.2d 692 (5th Cir. 1968) (question of implied right of action under § 17(a) not raised or explicitly addressed); *Allico National Corp. v. Amalgamated Meat Cutters and Butcher Workmen*, 397 F.2d 727 (7th Cir. 1968) (same); *Surowitz v. Hilton Hotels Corp.*, 342 F.2d 596 (7th Cir. 1965), *rev'd on other grounds*, 383 U.S. 363 (1966) (same).

Petitioner's strained effort to bolster her "legislative reenactment" theory does not end there. In the same Appendix H, Petitioner refers to other courts which had assumed that an implied right existed under § 17(a) "as of 1975." Inexplicably, Petitioner cites cases decided *after* June 4, 1975, the date when Congress enacted compre-

and *Curran* supported implication of a private cause of action under § 17(a), the court in *Sheftelman v. Jones,* 605 F.Supp. 549 (N.D. Ga. 1984), noted:

> Even applying the test set forth in *Curran* and *Huddleston* leaves the court unconvinced that a private cause of action should be implied under section 17(a). *Because the courts that addressed the question before 1975 were divided as to whether a private right of action existed under section 17(a),* the court cannot determine whether Congress intended to permit a private right of action under this section when it revised the securities laws in 1975 without altering the language of section 17.

605 F.Supp. at 552 (emphasis added). Similarly, in *Brabham v. Patenta N.V.*, 614 F.Supp. 568 (D. Or. 1984), the court determined that *Huddleston* was inapplicable to § 17(a) because "[i]t can scarcely be said after a review of the case law in existence in 1975 that there was a 'judicial construction' of an implied private cause of action under § 17(a)." *Id.* at 570; *Memphis Housing Authority v. Paine, Webber, Jackson & Curtis, Inc.*, 639 F.Supp. at 113 ("the uniform and well-understood consensus of opinion required by *Curran* did not exist" with respect to § 17(a)).

---

hensive amendments to the 1934 Act. *See, e.g., Jenson v. Continental Financial Corporation*, 404 F.Supp. 792 (D. Minn. 1975) (decided November 19, 1975); *Wulc v. Gulf & Western Industries, Inc.*, 400 F.Supp. 99 (E.D. Pa. 1975) (decided August 5, 1975); *Cass v. Prior*, 404 F.Supp. 780 (D. Minn. 1975) (decided December 8, 1975); *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975) (decided June 17, 1975). Congress, of course, could not have approved of judicial decisions which did not even exist at the time it amended the 1934 Act.

In addition, a reading of the Ninth Circuit's opinion in *Puchall* establishes that the Court did not depart from the governing standard in reaching its decision. Although the Ninth Circuit did observe, correctly, that "[n]o overwhelming consensus ever existed in section 17(a) precedent," it found that the cases addressing the availability of a private right of action "had not *consistently and routinely* implied a private remedy at the times when Congress undertook any significant analysis of the Securities Act." *Puchall*, 823 F.2d at 1357 (emphasis added). This holding is in full accord with the standard enunciated in *Huddleston* and *Curran*.[10]

III

PETITIONER HAS NO SUBSTANTIAL INTEREST AT STAKE IN THE ADJUDICATION OF THE § 17(a) ISSUE BECAUSE NO SIGNIFICANT RELIEF HAS BEEN DENIED TO PETITIONER BY VIRTUE OF THE DECISION BELOW

Petitioner, attempting to circumvent congressional intent, argues that if no private right of action is implied under § 17(a), she will be denied access to state court. Such a contention is without merit and is wholly irrelevant to a determination whether Congress intended to create a private right of action under § 17(a).[11]

---

[10]The *Huddleston/Curran* test may be inapplicable in resolving the § 17(a) issue, because in 1975 Congress comprehensively amended only the 1934 Act, *not* the 1933 Act.

[11]Petitioner's heavy reliance on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), in support of its contention that failure to recognize a private cause of action under § 17(a) will somehow impede the benefits flowing from state court class actions is misplaced. The case does not even involve consideration of an implied right of action, and hardly constitutes authority for the implicit argument that public

First, no private litigant is foreclosed from state court by the decision below. Section 11 of the 1933 Act, 15 U.S.C. § 77k(a), explicitly provides that "any person" meeting the procedural and substantive requirements "may, either at law or in equity," file suit "in any court of competent jurisdiction." Section 12, 15 U.S.C. § 771, explicitly provides that persons violating its provisions "shall be liable" and that those wronged "may sue either at law or in equity in any court of competent jurisdiction." In addition, litigants are not foreclosed from choosing a state court forum to bring suits under state securities regulations or general fraud statutes. *See Reid v. Mann*, 381 F.Supp. at 528 (an aggrieved party "may seek redress in the state courts under state securities regulations or general fraud statutes").

In fact, the present shareholder class and derivatively represented corporation have not been denied a state forum. As previously noted, another state court derivative and class action complaint has been filed by a different party, but with some of the same counsel representing Petitioner, on behalf of the same class and corporation involved in the matter at hand and arising from the same transaction.

Second, it is specious to argue that because Congress chose in 1934 to vest *exclusive* jurisdiction in federal courts to entertain all claims under the 1934 Act (including those ultimately implied under § 10), it must have intended that jurisdictional requirement to be rendered meaningless by previous permission of the implication of

---

policy grounds alone may excuse a court from applying the modified *Cort* analysis. In addition, as the Court observed, "If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible." 472 U.S. at 820 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 337 (1982)).

comparable private rights of action under the 1933 Act granting *concurrent* jurisdiction to state courts.[12] Congress intended private rights of action explicitly granted by the 1933 Act, not the rights of action similar to those subject to exclusive jurisdiction in federal courts under the 1934 Act, to be actionable in state courts without right of removal.

Third, as previously established, this Court has repeatedly emphasized that legislative intent is the touchstone for determining whether an implied private right of action exists. This Court consistently has rejected contentions that any and all private rights of action must be implied to further promote a statute. *See, e.g., Northwest Airlines, Inc.,* 451 U.S. at 89-90, 98 n.41 (even though "policy considerations favor the recognition of the right," these assumptions do not provide a sufficient basis for recognizing the right; "The equitable considerations advanced by petitioner are properly addressed to Congress, not to the federal courts."); *Texas Industries*, 451 U.S. at 646 ("we recognize that, regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve").

Petitioner's wish to bypass the explicit requirements of the 1933 Act and the 1934 Act to press certain federal securities law claims in state court thus is inappropriate and seeks to evade contrary congressional intent.

---

[12]As elaborated in footnote 6, *supra*, § 10(b), as interpreted by Rule 10b-5, proscribes conduct similar to that regulated under § 17(a) of the 1933 Act.

IV

REVIEW AND REVERSAL OF THE QUESTION PRESENTED ULTIMATELY WOULD NOT CHANGE THE RESULT REACHED BELOW

The procedural posture of this case also persuasively argues against this Court's exercise of its discretionary jurisdiction. The resolution of the question whether there exists an implied right of action under § 17(a) will have little bearing on the case at hand because independent grounds exist upon which to uphold the removal to federal court. Thus, even if this Court were to conclude that a private right of action exists under § 17(a), the court below still would be compelled to determine whether Petitioner properly pleaded a § 17(a) claim, and, if so, whether the RICO claims and § 17(a) claims were "separate and independent." The District Court found in Respondent's favor on both points. Indeed, to avoid the issuance of a purely advisory opinion in this case, the Court would have to rule broadly that § 17(a) creates a private right of action for persons, such as Petitioner and the class she purports to represent, who do not even claim to be "purchasers" or "sellers." Even if there were an actual inter-Circuit conflict, this Court presumably would not want to address the question in the context of this case, but rather in the context of a case involving a plaintiff who actually sold or purchased stock during the critical time period.

CONCLUSION

This Petition should be denied. There is no live conflict among the Circuits on the issue of a private right of action under § 17(a). A clear consensus among the federal courts, applying the standards articulated by this Court, is that no such private right of action exists. Finally, the procedural posture of this case makes it both an unnecessary and inappropriate one in which to exercise this Court's discretionary review.

DATED: March 11, 1988

Respectfully submitted,

ROBERT S. WARREN
Counsel of Record
PHILLIP L. BOSL
RORY M. HERNANDEZ
SCOTT A. EDELMAN
SHEILA R. CAUDLE
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

RICHARD E. NOLAN
WILLIAM L. ROSOFF
DANIEL L. BROCKETT
DAVIS POLK & WARDWELL
One Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

Counsel for Respondent
William Belzberg

APPENDIX A

LIST OF RECENT CASES FINDING NO IMPLIED RIGHT OF ACTION UNDER § 17(a) BASED UPON ANALYSIS ESTABLISHED IN *CORT v. ASH* AND ITS PROGENY

FIRST CIRCUIT: *Prestera v. Shearson Lehman Brothers, Inc.*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,884, at 94,290 (D. Mass. 1986); *Kilmartin v. H.C. Wainwright & Co.*, 580 F.Supp. 604, 609 (D. Mass. 1984); *Kaufman v. Magid*, 539 F.Supp. 1088, 1098 (D. Mass. 1982).

SECOND CIRCUIT: *Cohen v. Goodfriend*, 665 F.Supp. 152, 155-56 (S.D.N.Y. 1987); *Ackerman v. Clinical Data, Inc.*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,207, at 91,570-71 (S.D.N.Y. 1985) *But see Toberoff v. B-J, Inc.*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,611 at 97,739 (S.D.N.Y. 1988) (following *Kirshner*).

THIRD CIRCUIT: *Warner Communications, Inc. v. Murdoch*, 581 F. Supp. 1482, 1496 (D. Del. 1984); *Hill v. Equitable Trust Co.*, 562 F.Supp. 1324, 1345 (D. Del. 1983); *Kimmel v. Peterson*, 565 F. Supp..476, 485-88 (E.D. Pa. 1983); *Hill v. Der*, 521 F.Supp. 1370, 1375-78 (D. Del. 1981); *see also Mursau Corp. v. Florida Penn Oil & Gas, Inc.*, 638 F.Supp. 259 (W.D. Pa. 1986), *aff'd without opinion*, 813 F.2d 398 (3d Cir. 1987).

FIFTH CIRCUIT: *Corwin v. Marney, Orton Investments*, 788 F.2d 1063, 1066 (5th Cir. 1986); *Landry v. All American Assurance Co.*, 688 F.2d 381, 387-91 (5th Cir. 1982); *see also Keys v. Wolfe*, 709 F.2d 413, 416 (5th Cir. 1983); *Simpson v. Southeastern Investment Trust*, 697 F.2d 1257, 1258 (5th Cir. 1983).

SIXTH CIRCUIT: *Memphis Housing Authority v. Paine, Webber, Jackson & Curtis, Inc.*, 639 F.Supp. 108, 111-14 (W.D. Tenn. 1986); *Jones v. First Equity Corp. of Florida*, 607 F.Supp. 350, 354-55 (E.D. Tenn. 1985); *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 551 F.Supp. 580, 586-87 (S.D. Ohio 1982); *Ingram Industries, Inc. v. Nowicki*, 502 F.Supp. 1060, 1069 (E.D. Ky. 1980).

SEVENTH CIRCUIT: *Design Time, Inc. v. Synthetic Diamond Technology, Inc.*, 674 F.Supp. 1564, 1574 (N.D. Ind. 1987); *Wagman v. FSC Securities Corp.*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,445, at 92,716 (N.D. Ill. 1985); *Beck v. Cantor, Fitzgerald & Co.*, 621 F.Supp. 1547, 1559-60 (N.D. Ill. 1985); *Citizens State Bank of Wittenberg v. Continental Assurance Co.*, 598 F.Supp. 1111, 1114-15 (W.D. Wis. 1984); *Roskos v. Shearson/American Express, Inc.*, 589 F.Supp. 627, 630-31 (E.D. Wis. 1984).

NINTH CIRCUIT: *Puchall v. Houghton, Cluck, Coughlin & Riley (In re Washington Public Power Supply System Securities Litigation)*, 823 F.2d 1349 (9th Cir. 1987); *David K. Lindenmuth Co. v. Shannon Financial Corp.*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,852 (N.D. Cal. 1986); *B&B Masonry Co. v. Young, Smith & Peacock, Inc.*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,707 (D. Ariz. 1986); *Riley v. Brazeau*, 612 F.Supp. 674, 679 (D. Or. 1985); *Brabham v. Patenta N.V.*, 614 F.Supp. 568, 569-71 (D. Or. 1984); *Bruns v. Ledbetter*, 583 F.Supp. 1050, 1053-54 (S.D. Cal. 1984); *In re Fortune Systems Securities Litigation*, 604 F.Supp. 150, 155-58 (N.D. Cal. 1984); *Hudson v. Capital Management International, Inc.*, 565 F.Supp. 615, 620 (N.D. Cal. 1983); *McFarland v. Memorex Corp.*, 493 F.Supp. 631, 651-53 (N.D. Cal. 1980).

TENTH CIRCUIT: *Jiffy Lube International, Inc. v. Grease Monkey Holding Corp.*, 671 F.Supp. 1275, 1278 (D. Colo. 1987); *In re Storage Technology Corp. Securities Litigation*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,716, at 93,479-80 (E.D. Colo. 1986); *Masri v. Wakefield*, 602 F.Supp. 404, 406 (D. Colo. 1983); *Freeman v. McCormack*, 490 F.Supp. 767, 768 (W.D. Okla. 1980); *Williams v. Nutritional Associates, Ltd.*, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,678 (W.D. Okla. 1980); *cf. Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 689 n.1 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981) (expressing "considerable doubt" that private action exists).

ELEVENTH CIRCUIT: *Currie v. Cayman Resources Corp.*, 835 F.2d 780, 784-85 (11th Cir. 1988); *Scharp v. Cralin & Co., Inc.*, 617 F.Supp. 476, 478 (S.D. Fla. 1985); *Sheftelman v. Jones*, 605 F.Supp. 549, 552 (N.D. Ga. 1984); *Summer v. Land & Leisure, Inc.*, 571 F.Supp. 380, 387 (S.D. Fla. 1983); *Fallani v. American Water Corp.*, 574 F.Supp. 81, 84 (S.D. Fla. 1983); *Blumberg v. Berland*, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,389 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1068 (11th Cir. 1982) (*per curiam*).

D.C. CIRCUIT: *Hammerman v. Peacock*, 607 F.Supp. 911, 915 (D.D.C. 1985).

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On March 11, 1988, I served the within Respondent's Brief in Opposition to Petition for Writ of Certiorari in re: "A. Jacques Lou vs. William Belzberg" in the United States Supreme Court, October Term 1987, No. 87-1430;

On the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

WILLIAM S. LERACH
LEONARD B. SIMON
EUGENE MIKOLAJCZYK
JOYCE FITZPATRICK
MILBERG WEISS BERSHAD SPECTHRIE & LERACH
225 Broadway, Suite 2000
San Diego, CA 92101
(619) 231-1058

DAVID B. GOLD
DAVID B. GOLD, a Professional Law Corporation
595 Market Street
Suite 2300
San Francisco, CA 94105
(415) 777-2230

Attorneys for Petitioners A. Jacques Lou and Pauline Mickler

ERWIN A. SHERMAN
LYNCH, SHERMAN & COX
1800 Meidinger Tower
Louisville, KY 40202
(502) 589-4215

MERRILL G. DAVIDOFF
SHERRIE R. SAVETT
MARTIN J. D'URSO
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Attorneys for Pauline Mickler

PETER W. JAMES
DAVID A. DESTINO
McCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017
(213) 624-2400

GEORGE WAILAND
CAHILL GORDON & REINDEL
80 Pine Street
New York, NY 10005
(212) 701-3000

Attorneys for Respondent Drexel Burnham Lambert Incorporated

CLAIRE JOHNSON
PARKER, MILLIKEN, CLARK, O'HARA & SAMUELIAN
333 South Hope Street
Los Angeles, CA 90071
(213) 683-6500

Attorneys for Nominal Respondent Ashland Oil, Inc.

RONALD S. ROLFE
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, NY 10005
(212) 422-3000

BRENTON F. GOODRICH
OVERTON, LYMAN & PRINCE
550 S. Flower Street
Los Angeles, CA 90071
(213) 683-1100

Attorneys for Ashland Director Respondents

All Parties to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on March 11, 1988, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA